19

THE WHOLE PROCEEDINGS

ON THE

T R I A L

OF AN INFORMATION EXHIBITED EX OFFICIO,
BY THE KING'S ATTORNEY GENERAL,

AGAINST

JOHN STOCKDALE;

FOR

A LIBEL ON THE HOUSE OF COMMONS,

TRIED IN THE COURT OF KING'S-BENCH WESTMINSTER, ON WEDNESDAY, THE NINTH OF DECEMBER, 1789,

BEFORE THE RIGHT HON. LLOYD LORD KENYON, CHIEF JUSTICE OF ENGLAND.

TAKEN IN SHORT HAND BY

JOSEPH GURNEY.

TO WHICH IS SUBJOINED,

AN ARGUMENT

IN SUPPORT OF

THE RIGHTS OF JURIES.

LONDON:

PRINTED FOR JOHN STOCKDALE, OPPOSSTE BURLINGTON-HOUSE, PICCADILLY.

M,DCC,Xc.

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PREFACE.

THE Pamphlet which gave riſe to the following Trial, was written by the Reverend Mr. Logan, ſome time one of the miniſters of Leith, near Edinburgh;—"A gentleman formed to be the ornament and inſtructor of the age in which he lived: All his writings are diſtinguiſhed by the ſagacity of their reaſonings, the brilliancy of their imaginations, and the depth of their philoſophical principles. Though cut off in the flower of his age, while the proſecution

againſt his publiſher was depending, he left behind him ſeveral reſpectable productions, and particularly Elements of Lectures upon the Philoſophy of Ancient Hiſtory; which, though imperfect, and unfiniſhed, will afford to the diſcerning, ſufficient reaſon to regret that his talents did not remain to be matured by age, and expanded by the foſtering breath of public applauſe."

Such is the character, given of Mr. Logan in the laſt New Annual Regiſter; but as his Review of the Charges againſt Mr. Haſtings has made ſo much noiſe in the world, it may not be unintereſting to ſtate by what means, he became ſo intimately acquainted, with the politics of India.

For ſome time previous to his deceaſe, Mr. Logan was the principal author of that part of the Engliſh Review, which gives the general ſtate of foreign and domeſtic

tic politics. The enquiries in the Houſe of Commons, which led to the impeachment of Mr. Haſtings, formed very naturally the moſt material part of that Review for a conſiderable time; and his Strictures upon the arguments, and the deciſion on the Benares and the Begum charges, are written with great force and elegance; and contain reflections infinitely more pointed, than any of thoſe which Mr. Fox objected to in his pamphlet.

Having qualified himſelf by the information that he had acquired, from intenſe application, to give to the world what he conceived to be a fair and impartial account of the adminiſtration of Mr. Haſtings, he ſat down voluntarily, without a wiſh or proſpect of perſonal advantage, to examine thoſe articles which had been preſented to the Houſe of Commons by the Managers, then a Committee of Secreſy, and which now form the

the articles before the Lords. When he had compleated his pamphlet, he ſubmitted it in manuſcript to the peruſal of a gentleman, who is intimately connected with Mr. Haſtings. That gentleman was certainly very ill qualified to adviſe him, as a lawyer; it never having entered into his imagination, that after the torrent of abuſe that had been poured out upon Mr. Haſtings, for years, *any thing* ſaid in reply could be deemed libellous, and therefore he merely examined whether Mr. Logan was correct in his ſtatement of facts, and communicated to him every particular relative to the laſt thirteen articles. Not ſatisfied with this communication, Mr. Logan examined the votes and the ſpeeches, as printed and circulated throughout Great Britain. After an accurate inveſtigation, he thought himſelf juſtified in inſerting in his pamphlet, what a member had ſaid in the Houſe, that the Commons

Commons had voted thirteen out of twenty articles, without reading them.

The bookſeller to whom Mr. Logan originally preſented his pamphlet, offered a ſum for it, which he conceived ſo inadequate to its importance, that he carried it to Mr. Stockdale, to whom he gave it; taking for himſelf a few copies only, which were ſent in his name to men of the firſt eminence in letters, both in London and Edinburgh.

After it had been ſome time in circulation, and read with great avidity, it was publicly complained of by Mr. Fox. That gentleman quoted what he conceived to be the libellous paſſages. The following day he moved an addreſs to his Majeſty, to direct his Attorney General to proſecute the authors and publiſhers, and the motion was carried *nemine contradicente;* but owing to the ſickneſs of the principal witneſs, the trial was deferred for nearly two years. This proſecution which has

has been attended with a very heavy expence to Mr. Stockdale, and has been nearly two years depending, hath excited univerſal attention,

The acknowledged accuracy of Mr. Gurney, is too well known to require any particular praiſe on this occaſion; but it never was more remarkable than in the preſent inſtance; yet the eloquent and excellent ſpeech of Mr. Erſkine, will appear to great diſadvantage to thoſe who had the good fortune to hear it, ſo much, even the beſt ſpeeches depend upon the power of delivery. It was ſpoke in as crowded a Court, as ever appeared in the King's-Bench. The exertions of that gentleman in ſupport of his clients are too well known, to acquire new force from any thing that can be ſaid of him here; but on no occaſion, and at no period, did he diſplay thoſe wonderful abilities that he poſſeſſes in a higher degree, and Mr. Erſkine will be quoted as the ſteady friend,

friend, and ſupporter of the Conſtitutional Rights of the people of Great-Britain, as long as the ſacred flame of Liberty ſhall animate the breaſt of an Engliſhman.

The reſult of this Trial proves how dangerous to public liberty it would be, were any body of men, parties and judges in their own cauſe. No good ſubject will call into queſtion unneceſſarily, any of the privileges claimed by the Houſe of Commons; but if in the inſtance before us, the Houſe, conſulting former precedents, had taken upon itſelf to ſtate the crime, and to pronounce judgment, a Britiſh ſubject might have been ſeized and impriſoned ſome months, probably to the ruin of himſelf and his family, without the poſſibility of reparation. It may therefore with the greateſt truth be obſerved, that by the exertions of Mr. Erſkine, and by the deciſion on this proſecution, the Freedom of the Preſs, and the Liberty of the Subject, are fully ſecured.

January 13*th*, 1790.

ERRATA.

Page 38 Line 19, for conteſt, read context.
—— 49 —— 18, for Loggan, read Logan.
—— 50 —— 6, for policys, read policies.
—— 56 —— for ſupport, read ſuppoſed.
—— 65 —— 12, and 17, for Lord Cornwallis, read Sir J. Macpherſon.
—— 115 —— 21, for bais, read bias.

THE

TRIAL

OF

JOHN STOCKDALE.

THE INFORMATION.

Of EASTER TERM, *in the Twenty-eighth Year of the Reign of King* GEORGE *the Third.*

Middleſex, *to wit.* } BE it remembered, That Richard Pepper Arden, Eſquire, Attorney General of our preſent Sovereign Lord the King, who for our preſent Sovereign Lord the King in this behalf proſecuteth, in his own proper perſon comes here into the Court of our ſaid Lord the King, before the King himſelf, at Weſtminſter, on Wedneſday next after fifteen days from the feaſt day of Eaſter in this ſame term, and for our ſaid Lord the King giveth the Court here to

 underſtand

underſtand and be informed, that before the printing and publiſhing of the ſeveral falſe, ſcandalous, infamous, wicked, malicious, and ſeditious libels, herein after mentioned, the Commons of Great Britain in Parliament aſſembled, had, at the bar of the Houſe of Lords, impeached Warren Haſtings, Eſquire, late Governor General of Bengal, of high crimes and miſdemeanors, and had there exhibited divers articles of impeachment of high crimes and miſdemeanors againſt the ſaid Warren Haſtings, to wit, at Weſtminſter aforeſaid, in the county of Middleſex aforeſaid; yet John Stockdale, late of the pariſh of St. James's, Weſtminſter, in the county of Middleſex, Bookſeller, well knowing the premiſes, but being a wicked, ſeditious, and ill-diſpoſed perſon, and having no regard for the laws of this realm, or for the public peace and tranquillity of this kingdom, and moſt unlawfully, wickedly, and maliciouſly deviſing, contriving, and intending to aſperſe, ſcandalize, and vilify the Commons of Great Britain in Parliament aſſembled, and moſt wickedly and audaciouſly to repreſent their proceedings in Parliament as corrupt and unjuſt, and to make it to be believed and thought as if the majority of the Commons of Great Britain in Parliament aſſembled, were a moſt wicked, tyrannical, baſe, and corrupt ſet of perſons, and to bring the Commons of Great Britain in Parliament aſſembled into hatred and contempt with the ſubjects of this kingdom, and to raiſe,

excite,

excite, and create moſt groundleſs diſtruſts in the minds of all the King's ſubjects, as if from the profligacy and wickedneſs of the Commons of Great Britain in Parliament aſſembled, great injuſtice would be done to the ſaid Warren Haſtings on the fifteenth day of February, in the twenty-eighth year of the reign of our ſaid preſent Sovereign Lord the King, at Weſtminſter aforeſaid, in the county of Middleſex aforeſaid; with force and arms, unlawfully, wickedly, maliciouſly, and ſeditiouſly printed and publiſhed, and cauſed and procured to be printed and publiſhed, in a certain book, or pamphlet, intitled,

" A Review of the Principal Charges againſt
" Warren Haſtings, Eſquire, late Go-
" vernor General of Bengal,"

A certain falſe, ſcandalous, wicked, ſeditious, and malicious libel of and concerning the ſaid impeachment of the ſaid Warren Haſtings, ſo exhibited as aforeſaid, and of and concerning the Commons of Great Britain in Parliament aſſembled, containing amongſt other things divers falſe, ſcandalous, ſeditious, and malicious matters of and concerning the ſaid impeachment, and of and concerning the Commons of Great Britain in Parliament aſſembled, according to the tenor and effect following (to wit): The Houſe of Commons (meaning the Commons of Great

Britain in Parliament aſſembled,) has now given its final deciſion with regard to the merits and demerits of Mr. Haſtings, (meaning the ſaid Warren Haſtings, Eſquire, late Governor General of Bengal.) The grand inqueſt of England, (meaning the ſaid Commons of Great Britain in Parliament aſſembled,) have delivered their charges (meaning the charges of the ſaid Commons of Great Britain in Parliament aſſembled,) and preferred their impeachment (meaning their impeachment of the ſaid Warren Haſtings,); their allegations are referred to proof, and from the appeal to the collective wiſdom and juſtice of the nation, in the ſupreme tribunal of the kingdom, (meaning the Lords Spiritual and Temporal in Parliament aſſembled,) the queſtion comes to be determined, Whether Mr. Haſtings (meaning the ſaid Warren Haſtings, Eſquire,) be guilty or not guilty? What credit can we give to multiplied and accumulated charges, (meaning the ſaid charges of high crimes and miſdemeanors ſo exhibited, by the Commons of Great Britain in Parliament aſſembled as aforeſaid, againſt the ſaid Warren Haſtings,) when we find that they (meaning the ſaid charges of high crimes and miſdemeanors ſo exhibited by the Commons of Great Britain in Parliament aſſembled as aforeſaid, againſt the ſaid Warren Haſtings) originate from miſrepreſentation and falſehood, (meaning thereby to cauſe it to be believed and underſtood, that the ſaid charges of high crimes and miſdemeanors ſo exhibited by

the

the Commons of Great Britain in Parliament aſſembled as aforeſaid, did originate from miſrepreſentation and falſehood,); and in another part thereof according to the tenor and effect following (to wit): An impeachment of error in judgment, with regard to the quantum of a fine, and for an intention that never was executed and never known to the offending party, characteriſes a tribunal inquiſition rather than a Court of Parliament (meaning thereby to cauſe it to be believed and underſtood that the Commons of Great Britain in Parliament aſſembled had proceeded in the ſaid impeachment of the ſaid Warren Haſtings in a manner unjuſt and unworthy of a Houſe of Parliament of Great Britain,); and in another part thereof, according to the tenor and effect following (to wit): The other charges (meaning divers of the charges of the ſaid impeachment againſt the ſaid Warren Haſtings, Eſquire) are ſo inſignificant in themſelves, or founded on ſuch groſs miſrepreſentations, that they would not affect an obſcure individual, much leſs a public character; they are merely added to ſwell the catalogue of accuſations, as if the boldneſs of calumny would inſure its ſucceſs, and a multiplicity of charges were an accumulation of crimes. Thirteen of them (meaning thirteen of the ſaid charges ſo exhibited by the Commons of Great Britain in Parliament aſſembled againſt the ſaid Warren Haſtings, Eſquire, as aforeſaid) paſſed in the Houſe of Commons (meaning the ſaid Commons of Great

Britain in Parliament aſſembled) not only without inveſtigation, but without being read; and the votes (meaning the votes of the Commons of Great Britain in Parliament aſſembled) were given without enquiry, argument, or conviction; a majority (meaning a majority of the Commons of Great Britain in Parliament aſſembled) had determined to impeach; oppoſite parties met each other and juſtled in the dark, to perplex the political drama and bring the hero (meaning the ſaid Warren Haſtings, Eſquire,) to a tragic cataſtrophe; and in another part thereof, according to the tenor and effect following (to wit): But if, after exerting all your efforts in the cauſe of your country, you return covered with laurels and crowned with ſucceſs, if you preſerve a loyal attachment to your Sovereign you may expect the thunders of parliamentary vengeance; you will certainly be impeached, and probably be undone (meaning thereby to cauſe it to be believed and underſtood, that the Commons of Great Britain in Parliament aſſembled had impeached the ſaid Warren Haſtings of high crimes and miſdemeanors, not from motives of juſtice, but becauſe the ſaid Warren Haſtings had exerted all his efforts in the cauſe of his country, and returned covered with laurels and crowned with ſucceſs, and preſerved a loyal attachment to our ſaid preſent Sovereign Lord the King); and in another part thereof, according to the tenor and effect following (to wit): The office of calm deliberate

juſtice

juſtice is to redreſs grievances as well as to puniſh offences. It has been affirmed; that the natives of India have been deeply injured; but has any motion been made to make them compenſation for the injuries they have ſuſtained? Have the accuſers of Mr. Haſtings (meaning the ſaid Warren Haſtings, Eſquire,) ever propoſed to bring back the Rohillas to the country from which they were expelled? to reſtore Cheit Sing to the Zemindary of Benares? or to return to the Nabob of Oude, the preſent which the Governor of Bengal received from him, for the benefit of the Company? till ſuch meaſures are adopted, and in the train of negociation, the world has every reaſon to conclude that the impeachment of Mr. Haſtings (meaning the ſaid impeachment ſo exhibited by the ſaid Commons of Great Britain in Parliament aſſembled, againſt the ſaid Warren Haſtings, Eſquire,) is carried on from motives of perſonal animoſity, not from regard to public juſtice, to the great ſcandal and diſhonour of the Commons of Great Britain in Parliament aſſembled, and in high contempt of their authority, to the great diſturbance of the public peace and tranquillity of this kingdom, in contempt of our preſent Sovereign Lord the King and his laws, to the evil and pernicious example of all others in the like caſe offending, and alſo againſt the peace of our ſaid Sovereign Lord the King, his crown and dignity. And the ſaid Attorney General of our ſaid

preſent Lord the King, for our ſaid Lord the King, further giveth the Court here to underſtand and be informed, that the ſaid John Stockdale, being ſuch perſon as aforeſaid, and contriving, and wickedly and maliciouſly deviſing and intending as aforeſaid, afterwards, to wit, on the fifteenth day of February, in the twenty-eighth year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, with force and arms, unlawfully, wickedly, maliciouſly and ſeditiouſly printed and publiſhed, and cauſed to be printed and publiſhed, in a certain other book, or pamphlet, intitled,

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when we find that they (meaning the ſaid charges of high crimes and miſdemeanors, ſo exhibited by the Commons of Great Britain in Parliament aſſembled as aforeſaid, againſt the ſaid Warren Haſtings,) originate from miſrepreſentation and falſehood (meaning thereby to cauſe it to be believed and underſtood, that the ſaid charges of high crimes and miſdemeanors, ſo exhibited by the Commons of Great Britain, in Parliament aſſembled as aforeſaid, did originate from miſrepreſentation and falſehood, to the great ſcandal and diſhonour of the Commons of Great Britain in Parliament aſſembled, and in high contempt of their authority; to the great diſturbance of the public peace and tranquillity of this kingdom; in contempt of our preſent Sovereign Lord the King and his laws, to the evil and pernicious example of all others in the like caſe offending; and alſo, againſt the peace of our ſaid preſent Sovereign Lord the King, his crown and dignity. And the ſaid Attorney General of our ſaid Lord the King, for our ſaid Lord the King, further gives the Court here to underſtand and be informed, that the ſaid John Stockdale, being ſuch perſon as aforeſaid, and contriving and wickedly and maliciouſly deviſing and intending as aforeſaid, afterwards, to wit, on the fifteenth day of February, in the twenty-eighth year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, with force and arms, unlawfully, wickedly, maliciouſly and ſeditiouſly printed and publiſhed, and cauſed to be printed and publiſhed,

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Sovereign Lord the King and his laws, to the evil and pernicious example of all others in the like caſe offending; and alſo, againſt the peace of our ſaid preſent Sovereign Lord the King, his crown and dignity, &c. And the ſaid Attorney General of our ſaid Lord the King, for our ſaid Lord the King, further gives the court here to underſtand, and be informed, that the ſaid John Stockdale, being ſuch perſon as aforeſaid, and contriving and wickedly and malicioufly deviſing and intending as aforeſaid, afterwards, to wit, on the ſaid fifteenth day of February, in the twenty-eighth year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, with force and arms, unlawfully, wickedly, malicioufly, and ſeditioufly, printed and publiſhed, and cauſed to be printed and publiſhed, in a certain other book, or pamphlet, intitled,

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laurels, and crowned with ſucceſs; if you preſerve a loyal attachment to your Sovereign, you may expect the thunders of parliamentary vengeance; you will certainly be impeached, and probably be undone (meaning thereby to cauſe it to be believed and underſtood, that the Commons of Great Britain in Parliament aſſembled, had impeached the ſaid Warren Haſtings of high crimes and miſdemeanors, not from motives of juſtice, but becauſe the ſaid Warren Haſtings had exerted all his efforts in the cauſe of his country, and returned covered with laurels and crowned with ſucceſs, and preſerved a loyal attachment to our Sovereign Lord the preſent King); to the great ſcandal and diſhonour of the Commons of Great Britain in Parliament aſſembled, and in high contempt of their authority; to the great diſturbance of the public peace and tranquillity of this kingdom; in contempt of our preſent Sovereign Lord the King, and his laws; to the pernicious example of all others in the like caſe offending; and alſo, againſt the peace of our ſaid preſent Sovereign Lord the King, his crown and dignity, &c. And the ſaid Attorney General of our ſaid Lord the King, for our ſaid Lord the King, further gives the court here to underſtand and be informed, that the ſaid John Stockdale, being ſuch perſon as aforeſaid, and contriving, and wickedly and maliciouſly deviſing and intending as aforeſaid, afterwards, to wit, on the ſaid fifteenth day of February, in the twenty-eighth year aforeſaid, at Weſtminſter aforeſaid,

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" Warren Haſtings, Eſquire, late Gover-
" nor General of Bengal,"

A certain other falſe, ſcandalous, wicked, ſeditious, and malicious libel, of and concerning the ſaid impeachment of the ſaid Warren Haſtings, ſo exhibited as aforeſaid, and of and concerning the Commons of Great Britain in Parliament aſſembled, containing, amongſt other things, according to the tenor and effect following (to wit): The office of calm deliberate juſtice, is to redreſs grievances as well as to puniſh offences. It has been affirmed that the natives of India have been deeply injured, but has any motion been made to make them compenſation for the injuries they have ſuſtained? have the accuſers of Mr. Haſtings, (meaning the ſaid Warren Haſtings, Eſquire,) ever propoſed to bring back the Rohillas to the country from which they were expelled? to reſtore Cheit Sing to the Zemindary of Benares? or to return to the Nabob of Oude the preſent, which the Governor of Bengal received from him for the benefit of the Company? till ſuch meaſures are adopted,

adopted, and in the train of negociation, the world has every reaſon to conclude that the impeachment of Mr. Haſtings, (meaning the ſaid impeachment ſo exhibited by the Commons of Great Britain in Parliament aſſembled, againſt the ſaid Warren Haſtings, Eſquire, is carried on from motives of perſonal animoſity, not from regard to public juſtice); to the great ſcandal and diſhonour of the Commons of Great Britain in Parliament aſſembled, and in high contempt of their authority; to the great diſturbance of the public peace and tranquillity of this kingdom; in contempt of the preſent Sovereign Lord the King, and his laws; to the evil and pernicious example of all others in the like caſe offending; and alſo againſt the peace of our ſaid Lord the preſent King, his crown and dignity, &c. Whereupon the ſaid Attorney General of our ſaid Lord the King, who for our ſaid Lord the King, in this behalf, proſecuteth for our ſaid Lord the King, prayeth the conſideration of the court, here in the premiſes, and that due proceſs of law may be awarded againſt him the ſaid John Stockdale, in this behalf, to make him anſwer to our ſaid Lord the King, touching and concerning the premiſes aforeſaid.

COUNSEL

COUNSEL againſt MR. STOCKDALE.

The ATTORNEY GENERAL,
The SOLICITOR GENERAL,
Mr. BEARCROFT, and Mr. WOOD.

SOLICITORS.

Meſſ. CHAMBERLYNE and WHITE, Solicitors for the Affairs of his Majeſty's Treaſury.

COUNSEL for MR. STOCKDALE.

The Hon. THOMAS ERSKINE, and
Mr. DAYRELL.

SOLICITOR.

Mr. SAMUEL HARMAN, Jermyn Street.

[*The Information was opened by Mr.* WOOD.]

Mr. ATTORNEY GENERAL.

MAY it pleaſe your Lordſhip—Gentlemen of the Jury:

This information, which it has been my duty to file againſt the defendant, John Stockdale, comes before you in conſequence of an addreſs from the Houſe of Commons. This you may well ſuppoſe I do not mention as in any degree to influence that judgment which you are by and by to give, but I am to ſtate it as a meaſure which they have taken, thinking it in their wiſdom, as every body muſt think it—the fitteſt meaſure to bring before a Jury of the country, an offender of this ſort againſt them, and againſt their honor, wiſhing thereby to avoid what ſometimes indeed is unavoidable, but which they wiſh to avoid, whenever with propriety it can be done; the acting both as judges and accuſers, that they muſt neceſſarily have done, had they reſorted to their own powers, which are very great, and very extenſive, for the purpoſe of vindicating themſelves againſt inſult and contempt, but which in the preſent inſtance they wiſely forbore from exerciſing, thinking it better to leave this defendant to be dealt with by a fair and impartial Jury.

The offence which I impute to him is that of calumniating the Houſe of Commons, not in its ordinary legiſlative capacity, but when acting in its accuſatorial capacity, conceiving it to be their duty on adequate occaſions to inveſtigate the conduct of perſons in high ſtations, and to leave that conduct to be judged of by the proper conſtitutional tribunal, the Peers in Parliament aſſembled.

After due inveſtigation, the Commons of Great Britain thought it their duty, as is well known, to ſubmit the conduct of a ſervant of this country, who governed one of its moſt opulent dependencies for many years, to an enquiry before that tribunal. One ſhould have thought that every good ſubject of this country would have forborn imputing to the Houſe of Commons motives utterly unworthy of them, and of thoſe whom they repreſent; inſtead of this, to ſo great a degree now has the licentiouſneſs of the preſs ariſen, that motives the moſt unbecoming that can actuate even any individual, who may be concerned in the proſecution of public juſtice, are imputed to the repreſentatives of the people of this country in a body; no credit is given to them for meaning to do juſtice to their country, but, on the contrary, private, perſonal, and malicious motives are imputed to the Commons of Great Britain.

When

When ſuch an imputation is made upon the very firſt tribunal that this country knows; namely, the great inqueſt of the nation, the Commons in Parliament aſſembled, carrying any ſubject, who they may think has offended, to the bar of the Houſe of Lords—I am ſure you will think this an attack ſo dangerous to every tribunal, ſo dangerous to the whole adminiſtration of juſtice, that if it be well proved, you cannot fail to give it your ſtigma, by a verdict againſt the defendant.

Gentlemen, The particular paſſages which I ſhall put my finger upon in this libel, it will now be my duty to ſtate. You know very well, that it is your duty to conſider of the meaning that I have imputed to thoſe paſſages in the information; if you agree with me in that meaning, you convict; if you diſagree with me, of courſe you acquit.

The rule of your judgment I apprehend, with ſubmiſſion to his Lordſhip, will be the ordinary acceptation of the words, and the plain and obvious ſenſe of the ſeveral paſſages; if there is doubt, or if there is difficulty; if there is ſcrewing ingenuity, or unworthy ſtraining, on the part of a public proſecutor, you certainly will not pay attention to that; but, on the contrary, if he who runs may read; if the meaneſt capacity muſt underſtand theſe words, in the plain and ob-

vious ſenſe, to be the ſame as imputed in this information, in ſuch a caſe as that, ingenuity on the other ſide muſt be laid aſide by you, and you will not be over anxious to give a meaning to thoſe words, other than the ordinary and plain one.

In my ſituation, it does not become me to raiſe in you more indignation than the words themſelves, and the plain and ſimple reading of the libel, will do: Far be it from me, if it were in my power ſo to do, to provoke any undue paſſions or animoſity in you, againſt conduct even ſuch as this. The ſolemnity of the ſituation in which I am placed on this occaſion, obliges me to addreſs the intellect both of the Court and Jury, and neither their paſſions nor their indignation; for that reaſon I ſhall content myſelf with the few obſervations I have made, and betake myſelf merely to the words of the libel; and leaving that with you, I am moſt confident that if you follow the rule of interpretation which you always do upon ſuch occaſions, it cannot poſſibly happen that you ſhould differ from me, in the conſtruction which I have put upon theſe words.

Gentlemen, This I ſhould however mention to you is a libel perhaps of a more dangerous nature than the ribaldry that we daily ſee crowding every one of the prints that appear every morning upon our tables; becauſe it is contained

contained in a work which diſcovers the author of it to be by no means ignorant of the art of compoſition, but certainly to be of good underſtanding, and by no means unacquainted with letters. Therefore when calumny of this ſort comes ſo recommended, and addreſſing itſelf perhaps to the underſtandings of the moſt enlightened part of mankind—you underſtand, I mean thoſe who have had the beſt education—it may ſink deep into the minds of thoſe who compoſe the thinking and the judging part of the community; and by miſleading them, perhaps may be of more real danger than the momentary miſleading, or the momentary inflammation, of men's minds, by the ordinary publications of the day.

This book is intitled,

"A Review of the Principal Charges againſt
"Warren Haſtings, Eſquire, late Governor
"General of Bengal."

One paſſage in it is this;

"The Houſe of Commons has now given
"its final deciſion with regard to the
"merits and demerits of Mr. Haſtings.
"The grand inqueſt of England have
"delivered their charges, and preferred

" their impeachment; their allegations are
" referred to proof; and from the appeal
" to the collective wisdom and justice of
" the nation in the supreme tribunal of
" the kingdom, the question comes to be
" determined, whether Mr. Hastings *be*
" *guilty, or not guilty?*"

Another is this:

" What credit can we give to multiplied and
" and accumulated charges, when we find
" that they originate from misrepresenta-
" tion and falshood?"

Another is,

" An impeachment of *error* in *judgment*,
" with regard to the *quantum* of a fine,
" and for an intention that never was
" executed, characterizes a tribunal in-
" quisition, rather than a Court of Par-
" liament."

In another part it is said,

" The other charges are so insignificant in
" themselves, or founded on such gross
" mis-

" miſrepreſentations, that they would not
" affect an obſcure individual, much leſs a
" public character."

And again,

" If ſucceſs, in any degree, attends the de-
" ſigns of the accuſers of Mr. Haſtings,
" the voice of Britain henceforth to her
" ſons, is, Go and ſerve your country;
" but if you tranſgreſs the line of official
" orders, though compelled by neceſſity,
" you do ſo at the riſque of your fortune,
" your honour, and your life; if you act
" with *proper prudence* againſt the intereſts
" of the empire, and bring calamity and
" diſgrace upon your country, you have
" only to court oppoſition and coaleſce
" with your enemies, and you will find a
" party zealous and devoted to ſupport
" you; you may obtain a vote of thanks
" from the Houſe of Commons for your
" *ſervices*, and you may *read your hiſtory*
" *in the eyes of the mob*, by the light of
" bonfires and illuminations. But if, after

" exerting,

" exerting all your efforts in the cauſe of
" your country, you return, covered with
" laurels and crowned with ſucceſs; if
" you preſerve a loyal attachment to your
" Sovereign, you may expect the thunders
" of parliamentary vengeance; you will
" certainly be impeached, and probably be
" undone."

Another paſſage is this:

" The office of calm deliberate juſtice, is to
" redreſs grievances as well as to puniſh
" offences. It has been affirmed, that the
" natives of India have been deeply in-
" jured; but has any motion been made to
" make them compenſation for the injuries
" they have ſuſtained? Have the accuſers
" of Mr. Haſtings ever propoſed to bring
" back the Rohillas to the country from
" which they were expelled? To reſtore
" Cheit Sing to the Zemindary of Benares,
" or to return the Nabob of Oude the
" preſent which the Governor of Bengal
" received from him for the benefit of

" the

" the Company? Till ſuch meaſures are
" adopted, and in the train of negociation,
" the world has every reaſon to conclude,
" that the impeachment of Mr. Haſtings
" is carried on."

Now, Gentlemen, I leave you to judge what ſort of motives are imputed to the Houſe of Commons here.

" From motives of perſonal animoſity, not
" from regard to public juſtice."

The general meaning, without ſpecifying it in technical language, which I have thought it my duty to impute to theſe words, is ſhortly this: That the Houſe of Commons, without conſideration, without reading, without hearing, have not been aſhamed to accuſe a man of diſtinguiſhed ſituation; and to pervert their accuſatorial character from the purpoſes of deliberate, thoughtful, conſiderate juſtice, to immediate haſty, paſſionate, vindictive, perſonal animoſity. He repreſents, that the better a man conducts himſelf—the more deſerving he has rendered himſelf of his country from his paſt conduct, the more he expoſes himſelf to the vindictive proceedings of Parliament—that ſuch a man will be impeached and ruined.

In

In another paſſage, perſonal animoſity (the very words are uſed) is imputed to them as the motive of their conduct—theſe are too plain for you, Gentlemen, to differ with me in the interpretation.

I do not chuſe to waſte your time, and that of my Lord, in ſo plain a caſe, with much obſervation; but, hacknied as it may be, it is my duty, upon every one of theſe occaſions, to remind you, Gentlemen, that the ſecurity of the preſs conſiſts in its good regulation—if it is meant that it ſhould be preſerved with benefit to the public, it muſt be from time to time lopped of its exceſſes, by reaſonable and proper verdicts of Juries, in fit and clear caſes.

EVIDENCE FOR THE CROWN.

Mr. SOLICITOR GENERAL—We will prove that the Houſe of Commons impeached Mr. HASTINGS.

JOSEPH WHITE, Eſq. *(ſworn.)*

Examined by Mr. SOLICITOR GENERAL.

Q. WHAT papers have you in your hand?

A. This is a copy of the Journals of the Houſe of Commons—And this is a copy of the Journals of the Houſe of Lords; *(producing them)* I examined them with the original manuſcript journals.

Mr. Erſkine. How did you examine them?

A. I examined them by one of the clerks—reading the Journal to me, and my reading the copy to him afterwards—I examined them both ways.

Mr. Erſkine. They need not be read; we all know the fact.

Mr. Solicitor General. Your Lordſhip knows we proved the publication of the paper yeſterday.

On the preceding day, upon the trial of the information againſt William Perryman, for a libel in the Morning Herald, William Gotobed was called to prove the publication of the news paper—Mr. Erſkine, for the accommodation of the witneſs, who was very ill, conſented that he ſhould at the ſame time be admitted to give his evidence relative to this trial—when his examination was as follows:

WILLIAM

WILLIAM GOTOBED *(ſworn.)*

I bought this pamphlet, (producing it) at Mr. Stockdale's ſhop in Piccadilly.

Mr. Erſkine. Who ſerved you with it?

A. A boy who was in the ſhop.

Mr. Erſkine. Whether the boy was acting regularly as a ſervant in the ſhop?

A. Mr. Stockdale was in the ſhop at the time I bought it, and the boy was acting as his ſervant.

Mr. Erſkine. I admit that the witneſs has proved that he bought this book at the ſhop of Mr. Stockdale—Mr. Stockdale himſelf being in the ſhop—from a young man who acted as his ſervant.

The Hon. THOMAS ERSKINE, for the Defendant.

Gentlemen of the Jury,

Mr. Stockdale, who is brought as a criminal before you for the publication of this book, has, by employing me as his advocate, repoſed what muſt appear to many an extraordinary degree of confidence; ſince, although he well knows that I am perſonally connected in friendſhip with moſt of thoſe, whoſe conduct and opinions are principally arraigned by its author he nevertheleſs commits to my hands his defence and juſtification.

A truſt apparently ſo delicate, and ſingular, vanity is but too apt to whiſper an application of to ſome fancied merit of ones own; but it is proper, for the honor of the Engliſh Bar, that the world ſhould know ſuch things happen to all of us daily, and of courſe; and that the defendant, without any ſort of knowledge of me, or any confidence that was perſonal, was only not afraid to follow up an accidental retainer, from the knowledge he has of the general character of the profeſſion.

Happy indeed is it for this country, that whatever intereſted diviſions may characterize other places, of which I may have occaſion to ſpeak to day, however the Councils of the higheſt depart-

ments

ments of the ſtate may be occaſionally diſtracted by perſonal conſiderations, they never enter theſe walls to diſturb the adminiſtration of juſtice: Whatever may be *our* public principles, or the private habits of *our* lives, they never caſt even a ſhade acroſs the path of our profeſſional duties.

If this be the characteriſtic even of the bar of an Engliſh Court of Juſtice, what ſacred impartiality may not every man expect from its jurors and its bench?

As, from the indulgence which the Court was yeſterday pleaſed to give to my indiſpoſition, this information was not proceeded on when you were attending to try it, it is probable you were not altogether inattentive to what paſſed on the trial of the other indictment, proſecuted alſo by the Houſe of Commons; and therefore, without a re-ſtatement of the ſame principles, and a ſimilar quotation of authorities to ſupport them, I need only remind you of the law applicable to this ſubject, as it was then admitted by the Attorney General, in conceſſion to my propoſitions, and confirmed by the higher authority of the Court, viz.

Firſt, That every information or indictment muſt contain ſuch a deſcription of the crime, that the defendant may know what crime it is which he is called upon to anſwer.

Secondly,

Secondly, That the Jury may appear to be warranted in their concluſion of guilty or not guilty.

And, laſtly, That the Court may ſee ſuch a preciſe and definite tranſgreſſion upon the record, as to be able to apply the puniſhment which judicial diſcretion may dictate, or which poſitive law may inflict.

It was admitted alſo to follow as a mere corollary from theſe propoſitions, that where an information charges a writing to be compoſed or publiſhed of and concerning the Commons of Great Britain, with an intent to bring that body into ſcandal and diſgrace with the public, the author cannot be brought within the ſcope of ſuch a charge, unleſs the Jury, on examination, and compariſon of the whole matter, written or publiſhed, ſhall be ſatisfied that the particular paſſages charged as criminal, when explained by the context, and conſidered as part of one entire work, were meant and intended by the author to vilify the Houſe of Commons as a body, and were written of and concerning them in Parliament aſſembled.

Theſe principles being ſettled, we are now to ſee what the preſent information is.

It charges, that the defendant, ‘ unlawfully, ‘ wickedly, and maliciouſly deviſing, contriving,

'and intending to aſperſe, ſcandalize, and vilify 'the Commons of Great Britain in Parliament 'aſſembled; and moſt wickedly, and audaciouſly 'to repreſent their proceedings as corrupt and 'unjuſt, and to make it believed and thought, as 'if the Commons of Great Britain in Parliament 'aſſembled, were a moſt wicked, tyrannical, baſe, 'and corrupt ſet of perſons, and to bring them 'into diſgrace with the public.' The defendant publiſhed—*What?*—*Not* thoſe latter ends of ſentences, which the Attorney General has read from his brief, as if they had followed one another in order in this book;—*Not* thoſe ſcraps and tails of paſſages which are patched together upon this record, and pronounced in one breath, as if they exiſted without intermediate matter in the ſame page, and without context any where.—*No*—This is not the accuſation, even mutilated as it is: For the information charges, *that with intention to vilify the Houſe of Commons*, the defendant publiſhed the whole book, deſcribing it on the record by its title:

"A Review of the Principal Charges againſt
"Warren Haſtings, Eſq, late Governor
"General of Bengal;"

In which amongſt other things the matter particularly ſelected is to be found. Your enquiry therefore is not confined to, Whether the defendant publiſhed

thoſe

thoſe ſelected parts of it; and whether, looking at them as they are diſtorted by the information, they carry in fair conſtruction the ſenſe and meaning which the innuendos put upon them; but whether the author of the *entire work*,—I ſay the author, ſince, if he could defend himſelf, the publiſher unqueſtionably can; whether the author wrote the volume which I hold in my hand, as a free, manly, bona fide diſquiſition of criminal charges againſt his fellow citizen; or whether the long eloquent diſcuſſion of them, which fills ſo many pages, was a mere cloak and cover for the introduction of the ſuppoſed ſcandal imputed *to the ſelected paſſages;* the mind of the writer all along being intent on traducing the Houſe of Commons, and not on fairly anſwering thir charges againſt Mr. Haſtings.

This, gentlemen, is the principal matter for your conſideration; and therefore, if after you ſhall have taken the book itſelf into the chamber, which will be provided for you, and read the whole of it with impartial attention;—if after the performance of this duty, you can return here, and with clear conſciences pronounce upon your oaths that the impreſſion made upon you by theſe pages is that the author wrote them with the wicked, ſeditious, and corrupt intentions, charged by the information; you have then my full permiſſion to find the defendant guilty. But if, on the other hand, the general tenor of the com-

poſition ſhall impreſs you with reſpect for the author, and point him out to you as a man miſtaken perhaps himſelf, but not ſeeking to deceive others:—If every line of the work ſhall preſent to you an intelligent animated mind, glowing with a chriſtian compaſſion towards a fellow man, whom he believed to be innocent, and with a patriot zeal for the liberty of his country, which he conſidered as wounded through the ſides of an oppreſſed fellow citizen; if this ſhall be the impreſſion on your conſciences and underſtandings, when you are called upon to deliver your verdict; then hear from me, that you not only work private injuſtice, but break up the preſs of England, and ſurrender her rights and liberties for ever, if you convict him.

Gentlemen, to enable you to form a true judgment of the meaning of this book, and of the intention of its author, and to expoſe the miſerable juggle that is played off in the information, by the combination of ſentences, which in the work itſelf have no bearing upon one another—I will firſt give you the publication as it is charged upon the record, and preſented by the Attorney General in opening the caſe for the Crown; and I will then, by reading the interjacent matter which is ſtudiouſly kept out of ſight, convince you of its true interpretation. The information, beginning with the firſt page of

the

the book, charges, as a libel upon the Houſe of Commons, the following ſentence:

" The Houſe of Commons has now given its
" final deciſion with regard to the merits
" and demerits of Mr. Haſtings. The
" grand inqueſt of England have de-
" livered their charges, and preferred their
" impeachment; their allegations are re-
" ferred to proof; and from the appeal
" to the collective wiſdom and juſtice of
" the nation in the ſupreme tribunal of
" the kingdom, the queſtion comes to be
" determined, whether Mr. Haſtings *be*
" *guilty or not guilty?*

It is but fair however to admit, that this firſt ſentence, which the moſt ingenious malice cannot torture into a criminal conſtruction, is charged by the information rather as introductory to what is made to follow it, than as libellous in itſelf; for the Attorney General, from this introductory paſſage in the firſt page, goes on at a leap to page *thirteenth*, and reads, almoſt without a ſtop, as if it immediately followed the other.

" What credit can we give to multiplied and
" accumulated charges, when we find that
" they originate from miſrepreſentation
" and falſehood?"

From theſe two paſſages thus ſtanding together, *without the intervenient matter which occupies thirteen pages*, one would imagine that inſtead of inveſtigating the probability or improbability of the guilt imputed to Mr. Haſtings; inſtead of carefully examining the charges of the Commons, and the defence of them which had been delivered before them, or which was preparing for the Lords; the author immediately, and in a moment after ſtating the mere fact of the impeachment, had decided that the act of the Commons originated from miſrepreſentation and falſehood.

Gentlemen, in the ſame manner a veil is caſt over all that is written *in the next ſeven pages:* For knowing that the conteſt would help to the true conſtruction, not only of the paſſages charged before, but of thoſe in the ſequel of this information; the Attorney General, aware that it would convince every man who read it that there was no intention in the author to calumniate the Houſe of Commons, paſſes over by another leap *to page twenty;* and in the ſame manner, without drawing his breath, and as if it directly followed the

the two former ſentences *in the 1ſt and 13th pages*, reads from page 20th—

" An impeachment of error in judgment with
" regard to the quantum of a fine, and for
" an intention that never was executed,
" and never known to the offending party,
" characteriſes a tribunal of inquiſition
" rather than a Court of Parliament."

From this paſſage, by another vault, he leaps over *one and thirty pages more, to page fifty one;* where he reads the following ſentence, which he mainly relies on, and upon which I ſhall by and by trouble you with ſome obſervations.

" Thirteen of them paſſed in the Houſe of
" Commons not only without inveſtigation,
" but without being read; and the votes
" were given without enquiry, argu-
" ment, or conviction. A majority had
" determined to impeach; oppoſite parties
" met each other, and " *juſtled in the*
" *dark*, to perplex the political drama, and
" and bring the hero to a tragic cata-
" ſtrophe."

From thence, deriving new vigour from every exertion, he makes his laſt grand ſtride *over forty-four pages*, almoſt to the end of the book, charging a ſentence *in the ninety-fifth page*.

So that out of a volume of *one hundred and ten pages*, the defendant is only charged with a few ſcattered fragments of ſentences, picked out of *three or four*. Out of a work, conſiſting of about *two thouſand five hundred and thirty lines*, of manly ſpirited eloquence, only *forty or fifty lines* are culled from different parts of it, and artfully put together, ſo as to rear up a libel, out of a falſe context by a ſuppoſed connexion of ſentences with one another, which are not only entirely independent, but which, when compared with their antecedents, bear a totally different conſtruction.

In this manner the greateſt works upon government, the moſt excellent books of ſcience, the ſacred ſcriptures themſelves, might be diſtorted into libels; by forſaking the general context, and hanging a meaning upon ſelected parts:—Thus, as in the text put by Algernon Sidney,

" The fool has ſaid in his heart there is no
" God;"

The Attorney General on the principle of the preſent proceeding againſt this pamphlet, might indict

dict the publiſher of the bible for blaſphemouſly denying the exiſtence of heaven, in printing

"*There is no God.*"

For theſe words alone, without the context, would be ſelected by the information, and the bible, like this book, would be *underſcored* to meet it. Nor could the defendant in ſuch a caſe have any poſſible defence, unleſs the Jury were permitted to ſee, by the book itſelf, that the verſe, inſtead of denying the exiſtence of the Divinity, only imputed that imagination to a fool.

Gentleman, having now gone through the Attorney General's reading, the book ſhall preſently come forward and ſpeak for itſelf.

But before I can venture to lay it before you, it is proper to call your attention to how matters ſtood at the time of its publication; without which the author's meaning and intention cannot poſſibly be underſtood.

The Commons of Great Britain in Parliament aſſembled, had accuſed Mr. Haſtiings, as Governor General of Bengal, of high crimes and miſdemeanors; and their juriſdiction for that high purpoſe of national juſtice, was unqueſtionably competent. But it is proper you ſhould know the nature of this inquiſitorial

inquiſitorial capacity.—The Commons, in voting an impeachment, may be compared to a Grand Jury, finding a bill of indictment for the Crown: neither the one nor the other can be ſuppoſed to proceed, but upon the matter which is brought before them; neither of them can find guilt without accuſation, nor the truth of accuſation without evidence.

When therefore we ſpeak of the *accuſer* or *accuſerers*, of a perſon indicted for any crime, although the Grand Jury are the accuſers *in form*, by giving effect to the accuſation; yet in common parlance we do not conſider them the reſponſible authors of the proſecution. If I were to write of a moſt wicked indictment, found againſt an innocent man, which was preparing for trial, nobody who read it would conceive I meant to ſtigmatize the Grand Jury that found the bill; but it would be enquired immediately, who was the proſecutor, and who were the witneſſes on the back of it. In the ſame manner I mean to contend, that if this book is read with only common attention, the whole ſcope of it will be diſcovered to be this;

That in the opinion of the author, Mr. Haſtings had been accuſed of malicious adminiſtration in India, from the heat and ſpleen of political diviſions in Parliament, and not from any zeal for national honour or juſtice; that the impeach-

ment

ment did not originate from Government, but from a faction banded againſt it, which, by miſrepreſentation and violence, had faſtened it on an unwilling Houſe of Commons; that, prepoſſeſſed with this ſentiment (which, however unfounded, makes no part of the preſent buſineſs, ſince the publiſher is not called before you for defaming individual members of the Commons, but for a contempt of the Commons as a body,) the author purſues the charges, article by article;—enters into a warm and animated vindication of Mr. Haſtings, by regular anſwers to each of them; and that, as far as the mind and ſoul of a man can be viſible, I might almoſt ſay, embodied in his writings, his intention throughout the whole volume appears to have been to charge with injuſtice the private accuſers of Mr. Haſtings, and not the Houſe of Commons as a body; which undoubtedly rather reluctantly gave way to, than heartily odopted the impeachment.

This will be found to be the palpable ſcope of the book; and no man who can read Engliſh, and who, at the ſame time, will have the candour and common ſenſe to take up his impreſſions from what is written in it, inſtead of bringing his own along with him to the reading of it, can poſſibly underſtand it otherwiſe.

But it may be ſaid, that admitting this to be the ſcope and deſign of the author, what right had he to canvaſs the merits of an accuſation upon the

the records of the Commons; more eſpecially while it was in the courſe of legal procedure. This I confeſs might have been a ſerious queſtion; but the Commons, *as Proſecutors of this Information*, ſeem to have waved, or forfeited their right to aſk it.

Before they ſent the Attorney General into this place, to puniſh the publication of *anſwers* to their charges, they ſhould have recollected that their own want of circumſpection in the maintenance of their privileges, and in the protection of perſons accuſed before them, had given to the public *the charges themſelves*, which ſhould have been confined to their own journals.—The courſe and practice of Parliament might warrant the printing of them for the uſe of their own Members, but there the publication ſhould have ſtopt, and all further progreſs been reſiſted by authority.

If they were reſolved to conſider *anſwers to their charges* as a contempt of their privileges, and to puniſh the publication of them by ſuch ſevere proſecutions, it would have well become them to have begun firſt with thoſe printers who by publiſhing *the charges themſelves* throughout the whole kingdom, or rather throughout the whole civilized world, were anticipating the paſſions and judgments of the public againſt a ſubject of England upon his trial, ſo as to make the publication *of*

anſwers

anſwers to them not merely a privilege, but a debt and duty to humanity and juſtice.

The Commons of Great Britain claimed and exerciſed the privileges of queſtioning the innocence of Mr. Haſtings by their impeachment; but as, however queſtioned, it is ſtill to be preſumed and protected, until guilt is eſtabliſhed by judgment, he whom they had accuſed, had an equal claim upon their juſtice, to guard him from prejudice and miſrepreſentation until the hour of trial.

Had the Commons, therefore, by the exerciſe of their high, neceſſary and legal privileges, kept the public aloof from all canvaſs of their proceedings, by an early puniſhment of printers, who, without reſerve or ſecrecy, ſent out *the charges* into the world from a thouſand preſſes in every form of publication, they would have then ſtood upon ground to-day, from whence no argument of policy or juſtice could have removed them; becauſe nothing can be more incompatible with either, than appeals to the many upon ſubjects of judicature, which by common conſent a few are appointed to determine, and which muſt be determined by facts and principles, which the multitude have neither leiſure nor knowledge to inveſtigate. But then let it be remembered, that it is for thoſe who have the authority to accuſe and puniſh,

to

to ſet the example of, and to enforce this reſerve, which is ſo neceſſary for the ends of juſtice.

Courts of law therefore in England never endure the publication of *their* records; and a proſecutor of an indictment would be attached for ſuch a publication; and upon the ſame principle, a defendant would be puniſhed for anticipating the juſtice of his country, by the publication of his defence, the public being no party to it, until the tribunal appointed for its determination be open for its deciſion.

Gentlemen, you have a right to take judicial notice of theſe matters, without the proof of them by witneſſes; for jurors may not only without evidence found their verdicts on facts that are notorious, but upon what they know privately themſelves, after revealing it upon oath to one another; and therefore you are always to remember, that this book was written when the *Charges* againſt Mr. Haſtings, *to which it is an anſwer*, were, to the knowledge of the Commons, (for we cannot preſume our watchmen to have been aſleep,) publicly hawked about in every pamphlet, magazine, and newſpaper in the kingdom.

Gentlemen, you well know with what a curious appetite theſe Charges were devoured by the whole

whole public, intereſting as they were, not only from their importance, but from the merit of their compoſition; certainly not ſo intended by the honorable and excellent compoſer to oppreſs the accuſed, but becauſe the commoneſt ſubjects ſwell into eloquence under the touch of his ſublime genius.

Thus by the remiſſneſs of the Commons, *who are now the proſecutors of this information*, a ſubject of England, who was not even charged with contumacious reſiſtance to authority, much leſs a proclaimed outlaw, and therefore fully entitled to every protection which the cuſtoms and ſtatutes of the kingdom hold out for the protection of Britiſh liberty, ſaw himſelf pierced with the arrows of thouſands and ten thouſands of libels.

Gentlemen, before I venture to lay the book before you, it muſt be yet further remembered, (for the fact is equally notorious,) that under theſe unauſpicious circumſtances, the trial of Mr. Haſtings at the bar of the Lords had actually commenced long before its publication.

There the moſt auguſt and ſtriking ſpectacle was daily exhibited, which the world in any age of it ever witneſſed. A vaſt ſtage of juſtice was erected, awful from its high authority, ſplendid from its illuſtrious dignity, venerable from the learning

learning and wiſdom of its judges, captivating and affecting from the mighty concourſe of all ranks and conditions which daily flocked into it, as into a theatre of pleaſure; there, when the whole public mind was at once awed and ſoftened to the impreſſion of every human affection, there appeared, day after day, one after another, men of the moſt powerful and exalted talents, eclipſing by their accuſing eloquence the moſt boaſted harangues of antiquity; rouſing the pride of national reſentment, by the boldeſt invectives againſt broken faith, and violated treaties, and ſhaking the boſom with alternate pity and horror, by the moſt glowing pictures of inſulted nature and humanity. Ever animated and energetic, from the love of fame, which is the inherent paſſion of genius; firm and indefatigable from a ſtrong prepoſſeſſion of the juſtice of their cauſe.

Gentlemen, when the author ſat down to write the book now before you, all this terrible, unceaſing, exhauſtleſs artillery of warm zeal, matchleſs vigour of underſtanding, conſuming and devouring eloquence, united with the higheſt dignity, was daily, and without proſpect of concluſion, pouring forth upon one private unprotected man, who was bound to hear it, in the face of the whole people of England, with reverential ſubmiſſion and ſilence.

Gentlemen, I do not complain of this as I did of the publication of the Charges; becauſe it is what

what the law allowed, and ſanctioned in the courſe of a public trial; but when it is remembered that we are not angels, but weak fallible men, and that even the noble Judges of that high tribunal are cloathed beneath their ermines with the common infirmities of man's nature, it will bring us all to a proper temper for conſidering the book itſelf, which will in a few moments be laid before you.

Gentlemen, it was under all theſe circumſtances, and amidſt the blaze of paſſion and prejudice, which the ſcene I have been endeavouring faintly to deſcribe to you might be ſuppoſed likely to produce, that the author, whoſe name I will now give to you, ſat down to compoſe the book which is proſecuted to day as a libel.

The hiſtory of it is very ſhort and natural.

The Rev. Mr. Loggan, Miniſter of the Goſpel at Leith in Scotland, a clergyman of the pureſt morals, and as you will ſee by and by of very ſuperior talents, well acquainted with the human character, and knowing the difficulty of bringing back public opinion after it is ſettled on any ſubject, took a warm, unbought, unſolicited intereſt in the ſituation of Mr. Haſtings, and determined, if poſſible, to arreſt and ſuſpend the public judgment concerning him. He felt for the

ſituation of a fellow citizen, expoſed to a trial which, whether right or wrong, is undoubtedly a ſevere one; a trial, certainly not confined to a few criminal acts, like thoſe we are accuſtomed to, but comprehending the tranſactions of a whole life, and the complicated policys of entire nations; a trial, which had neither viſible limits to its duration, bounds to its expence, nor circumſcribed compaſs for the graſp of memory or underſtanding; a trial, which had therefore broke looſe from the common forum of deciſion, and had become the the univerſal topic of diſcuſſion in the world, ſuperſeding not only every other grave purſuit, but every other faſhionable diſſipation.

Gentlemen, the queſtion you have therefore to try upon all this matter, is extremely ſimple; it is neither more nor leſs than this: At a time when the charges againſt Mr. Haſtings were, by the implied conſent of the Commons, in every hand, and on every table; when by their Managers, the lightning of eloquence was inceſſantly conſuming him, and flaſhing in the eyes of the public; when every man was with perfect impunity ſaying, and writing, and publiſhing juſt what he pleaſed of the ſuppoſed plunderer and devaſtator of nations; would it have been criminal *in Mr. Haſtings himſelf* to have reminded the public that he was a native of this free land, entitled to the common protection of her juſtice, and that he had a defence in his

turn

turn to offer to them, the outlines of which he implored them in the mean time to receive, as an antidote to the unlimited and unpuniſhed poiſon in circulation againſt him?

Gentlemen, this is, without colour or exaggeration, the true queſtion you are to decide. For I aſſert, without the hazard of contradiction, that if Mr. Haſtings himſelf could have ſtood juſtified or excuſed in your eyes, for publiſhing this volume in his own defence, the author, if he wrote it *bona fide* to defend him, muſt ſtand equally excuſed and juſtified; and if the author be juſtified, the publiſher cannot be criminal, unleſs you had evidence that it was publiſhed by him, with a different ſpirit and intention from thoſe in which it was written. The queſtion therefore is correctly what I juſt now ſtated it to be: Could *Mr. Haſtings* have been condemned to infamy for writing this book?

Gentlemen, I tremble with indignation, to be driven to put ſuch a queſtion in England. Shall it be endured, that a ſubject of this country, inſtead of being arraigned and tried for ſome ſingle act in her ordinary courts, where the accuſation, as ſoon at leaſt as it is made public, is followed within a few hours by the deciſion, may be impeached by the Commons for the tranſactions of twenty years, that the accuſation ſhall ſpread as wide as the region of letters, and the accuſed

ſhall ſtand day after day, and year after year, as a ſpectacle before the public, which ſhall be kept in a perpetual ſtate of inflammation againſt him; yet that he ſhall not, without the ſevereſt penalties, be permitted to ſubmit any thing to the judgment of mankind in his defence. If this be law (which it is for you to day to decide), ſuch a man has no trial; that great hall, built by our fathers for Engliſh juſtice, is no longer a court, but an altar; and an Engliſhman, inſtead of being judged in it by GOD AND HIS COUNTRY, is A VICTIM AND A SACRIFICE.—Gentlemen, you will carefully remember, that I am not preſuming to queſtion either the right or the duty of the Commons of Great Britain to impeach; neither am I arraigning the propriety of their ſelecting, as they have done, the moſt extraordinary perſons for ability which the age has produced to manage their impeachment. Much leſs am I cenſuring the Managers themſelves, charged with the conduct of it before the Lords, who were undoubtedly bound by their duty to the houſe, and to the public, to expatiate upon the crimes of the perſons whom they had accuſed.

None of theſe points are queſtioned by me, nor are in this place queſtionable. I only deſire to have it decided, whether if the Commons, when national expediency happens to call in their judgment for an impeachment, ſhall, inſtead of keeping it on their own records, and carrying it with due

ſolemnity

ſolemnity to the peers for trial, permit it without cenſure and puniſhment to be ſold like a common news paper in the ſhop of my client, ſo crowded with their own members, that no plain man, without privilege of Parliament, can hope even for a ſight of the fire in a winter's day; every man buying it, reading it, and commenting upon it; the gentleman himſelf who is the object of it, or his friend in his abſence, may not, without ſtepping beyond the bounds of Engliſh freedom, put a copy of what is thus publiſhed into his pocket, and ſend back to the very ſame ſhop for publication a bona fide, rational, able anſwer to it, in order that the bane and antidote may circulate together, and the public be kept ſtraight till the day of deciſion.

Gentlemen, if you think that this common duty of ſelf-preſervation, in the accuſed himſelf, which nature writes as a law upon the hearts of even ſavages and brutes, is nevertheleſs too high a privilege to be enjoyed by an impeached and ſuffering Engliſhman; or if you think it beyond the office of humanity and juſtice, when brought home to the hand of a brother or a friend, you will ſay ſo by your verdict of GUILTY—The deciſion will then be *yours;* and the conſolation-*mine*, that I laboured to avert it. A very ſmall part of the miſery which will follow from it, is likely to light upon *me;* the reſt will be divided

 amongſt

amongſt *yourſelves and your children.* Gentlemen, I obſerve plainly, and with infinite ſatisfaction, that you are ſhocked and offended at my even ſuppoſing it poſſible you ſhould pronounce ſuch a deteſtable judgment; and that you only require of me to make out to your ſatisfaction *(as I promiſed)* that the real ſcope and object of this book is a bona fide defence of Mr. Haſtings, and *not a cloak and cover for ſcandal on the Houſe of Commons.* Gentlemen, I engage to do this, and I engage for nothing more; I ſhall make an open manly defence. I mean to torture no expreſſions from their natural conſtructions, to diſpute no innuendos on the record, ſhould any of them have a fair application; nor to conceal from your notice any unguarded intemperate expreſſions, which may perhaps be found to chequer the vigorous and animated career of the work. Such a conduct might by accident, ſhelter the defendant; but it would be the ſurrender of the very principle on which alone the liberty of the Engliſh preſs can ſtand; and I ſhall never defend any man from a temporary impriſonment, by the permanent loſs of my own liberty, and the ruin of my country. I mean therefore to ſubmit to you, that though you ſhould find a few lines in page thirteen, or twenty-one; a few more in page fifty-one, and ſome others in other places; containing expreſſions bearing on the Houſe of Commons, even as a body, which, if written as independent paragraphs by themſelves, would

would be indefenſible libels ; yet that you have a right to paſs them over in judgment, provided the ſubſtance clearly appears to be a bona fide concluſion, ariſing from the honeſt inveſtigation of a ſubject which it was lawful to inveſtigate, and the queſtionable expreſſions, the viſible effuſion of a zealous temper, engaged in an honourable and legal purſuit. After this preparation I am not afraid to lay the book in its genuine ſtate before you.

The Pamphlet begins thus,

" THE Houſe of Commons has now given
" its final deciſion with regard to the
" merits and demerits of Mr. Haſtings.
" The grand inqueſt of England have deli-
" vered their charges, and preferred their
" impeachment ; their allegations are re-
" ferred to proof ; and from the appeal to
" the collective wiſdom and juſtice of the
" nation in the ſupreme tribunal of the
" kingdom, the queſtion comes to be de-
" termined, whether Mr. Haſtings *be guilty*
" *or not guilty* ?"

Now if immediately after what I have juſt read to you, (which is the firſt part charged by the information) the author had ſaid

" Will accuſations, built on ſuch a baſeleſs
" fabric, prepoſſeſs the public in favour
" of the impeachment? What credit can
" we give to multiplied and accumulated
" charges, when we find that they originate
" from miſrepreſentation and falſehood?

Every man would have been juſtified in pronouncing that he was attacking the Houſe of Commons, becauſe the groundleſs accuſations mentioned in the ſecond ſentence, could have no reference but to the Houſe itſelf, mentioned by name in the firſt and only ſentence which preceded it.

But, Gentlemen, to your aſtoniſhment, I will now read what intervenes between theſe two paſſages; from which you will ſee, beyond a poſſibility of doubt, that the author never meant to calumniate the Houſe of Commons, but to ſay that the accuſation of Mr. Haſtings before the whole Houſe grew out of a Committe of Secrefy eſtabliſhed ſome years before, and was afterwards brought forward by the ſpleen of private enemies, and a faction in the Government. This will appear, not only from the grammatical conſtruction of the words, but from what is better than words; from the meaning which a perſon writing as the friend of Mr. Haſtings muſt be ſuppoſed to have intended to convey. Why ſhould ſuch a friend attack the

Houſe

Houſe of Commons? Will any man gravely tell me, that the Houſe of Commons, as a body, ever wiſhed to impeach Mr. Haſtings? Do we not all know that they conſtantly hung back from it, and hardly knew where they were, or what to do, when they found themſelves entangled with it? My learned friend the Attorney General is a member of this aſſembly; perhaps he may tell you by and by what he thought of it, and whether he ever marked any diſpoſition in the majority of the Commons hoſtile to Mr. Haſtings. But why ſhould I diſtreſs my friend by the queſtion; the fact is ſufficiently notorious; and what I am going to read from the book itſelf, (which is left out in the information,) is too plain for controverſy.

" Whatever may be the event of the im-
" peachment, the proper exerciſe of ſuch
" power is a valuable privilege of the
" Britiſh conſtitution, a formidable guar-
" dian of the public liberty, and the dig-
" nity of the nation. *The only danger is,*
" *that from the influence of faction, and the*
" *awe which is annexed to great names,*
" *they may be prompted to determine before*
" *they inquire, and to pronounce judgment*
" *without examination.*"

Here

Here is the clue to the whole pamphlet. The author truſts to and reſpects the Houſe of Commons, but is afraid their mature and juſt examination will be diſturbed by *faction*.

Now, does he mean Government, by *faction?* Does he mean the majority of the Commons, by *faction?* Will the Houſe, which is the proſecutor here, ſanction that application of the phraſe; or will the Attorney General admit the majority to be the true innuendo of *faction?* I wiſh he would; I ſhould then have gained ſomething at leaſt by this extraordinary debate; but I have no expectation of the ſort; ſuch a conceſſion would be too great a ſacrifice to any proſecution, at a time when every thing is conſidered as faction that diſturbs the repoſe of the Miniſter in Parliament. But indeed, Gentlemen, ſome things are too plain for argument. The author certainly means *my friends*, who, whatever qualifications may belong to them, muſt be contented with the appellation of *faction*, while they oppoſe the Miniſter in the Houſe of Commons; but the Houſe, having given this meaning to the phraſe of faction for its own purpoſes, cannot in decency change the interpretation, in order to convict my client. I take that to be beyond the privilege of Parliament.

The ſame bearing upon individual members of the Commons, *and not on the Commons as a body*, is obvious throughout. Thus, after ſaying, in

page

page 9, that the Eaſt-India Company had thanked Mr. Haſtings for his meritorious ſervices (which is unqueſtionably true,) he adds,

" That mankind would abide by their deli-
" berate deciſion, rather than by the in-
" temperate aſſertion of a Committee,"

This he writes after the impeachment was found by the Commons at large; but he takes no account of their proceedings; imputing the whole to the original Committee, *i. e. the Committee of Secrecy;* ſo called, I ſuppoſe, from their being the authors of twenty volumes in folio, which will remain a ſecret to all poſterity, as nobody will ever read them. The ſame conſtruction is equally plain from what immediately follows:

" The report of the Committee of Secrecy
" alſo ſtates, that the happineſs of the na-
" tive inhabitants of India has been deeply
" affected, their confidence in Engliſh faith
" and lenity ſhaken and impaired, and the
" character of this nation wantonly and
" wickedly degraded."

Here again you are groſsly miſled by the omiſſion of near *twenty-one pages*. For the author, though he is here ſpeaking of this Committe *by name*,

name, which brought forward the charges to the notice of the Houſe, and which he continues to do onward to the next ſelected paragraph; yet, by arbitrarily ſinking the whole context, he is taken to be ſpeaking of the Houſe as a *body*, when, in the paſſage next charged by the information, he reproaches the *accuſers* of Mr. Haſtings. Although, ſo far is he from conſidering them as the charges of the Houſe of Commons, that in the very ſame page he ſpeaks of them as the charges, not even of the Committee, but of Mr. Burke alone, the moſt active and intelligent member of that body; and as having been circulated in India by a relation of that gentleman:

"The charges of Mr. Burke have been carried to Calcutta, and carefully circulated in India*."

* "Mr. William Burke, a couſin of the Member of Parliament, undertook this *friendly* office.

Now, if we were conſidering theſe paſſages of the work as calumniating a body of gentlemen, many of whom I muſt be ſuppoſed highly to reſpect, or as reflecting upon my worthy friend whoſe name I have mentioned, it would give riſe to a totally different enquiry, which it is neither my duty nor your's to agitate; but ſurely, the more that conſideration obtrudes itſelf upon us, the more clearly it demonſtrates, that the author's whole direction was againſt the individual accuſers

cuſers of Mr. Haſtings, and not againſt the Houſe of Commons, which merely truſted to the matter they had collected.

Although, from a caution which my ſituation dictates as repreſenting another, I have thought it my duty thus to point out to you the real intention of the author, as it appears by the fair conſtruction of the work, yet I proteſt, that in my own apprehenſion it is very immaterial, whether he ſpeaks of the Committee or of the Houſe, provided you ſhall think the whole volume a bona fide defence of Mr. Haſtings. This is the great point I am, by all my obſervations, endeavouring to eſtabliſh, and which I think no man who reads the following ſhort paſſages can doubt. Very intelligent perſons have indeed conſidered them, if founded in facts, to render every other amplification unneceſſary. The firſt of them is as follows:

" It was known, at that time, that Mr. " Haſtings had not only deſcended from " a public to a private ſtation, but that he " was perſecuted with accuſations and im- " peachments. But none of theſe *ſuffering* " *millions* have ſent their complaints to this " country: not a ſigh nor a groan has been " wafted from India to Britain. On the " contrary, teſtimonies the moſt honour-

" able

" able to the character and merit of Mr.
" Haſtings, have been tranſmitted by
" thoſe very princes whom he has been
" ſuppoſed to have loaded with the deepeſt
" injuries."

Here, Gentlemen, we muſt be permitted to pauſe together a little; for in examining whether theſe pages were written as an honeſt anſwer to the charges of the Commons, or as a proſtituted defence of a notorious criminal, whom the writer believed to be guilty, *truth becomes material at every ſtep*. For if *in any inſtance* he be detected of a *wilful* miſrepreſentation, he is no longer an object of your attention.

Will the Attorney General proceed then to detect the hypocriſy of our author, by giving us ſome detail of the proofs by which theſe perſonal enormities have been eſtabliſhed, and which the writer muſt be ſuppoſed to have been acquainted with? I aſk this as the defender of *Mr. Stockdale*, not of Mr. Haſtings, with whom I have no concern. I am ſorry, indeed, to be ſo often obliged to repeat this proteſt; but I really feel myſelf embarraſſed with thoſe repeated coincidencies of defence which thicken on me as I advance, and which were, no doubt, overlooked by the Commons when they directed this interlocutory enquiry into his conduct.

I aſk

I aſk then, *as counſel for Mr. Stockdale*, Whether, when a great ſtate criminal is brought for juſtice at an immenſe expence to the public, accuſed of the moſt oppreſſive cruelties, and charged with the robbery of princes and the deſtruction of nations; it is not open to any one to aſk, Who are his accuſers? What are the ſources and the authorities of theſe ſhocking complaints?—Where are the ambaſſadors or memorials of thoſe princes whoſe revenues he has plundered?—Where are the witneſſes for thoſe unhappy men in whoſe perſons the rights of humanity have been violated?—How deeply buried is the blood of the innocent that it does not riſe up in retributive judgment to confound the guilty! Theſe ſurely are queſtions, which, when a fellow-citizen is upon a long, painful, and expenſive trial, humanity has a right to propoſe; which the plain ſenſe of the moſt unlettered man may be expected to dictate, and which all hiſtory muſt provoke from the more enlightened.

When CICERO impeached VERRES before the great tribunal of Rome of ſimilar cruelties and depredations in *her* provinces, the Roman people were not left to ſuch enquiries. ALL SICILY ſurrounded the forum, demanding juſtice upon her plunderer and ſpoiler, with tears and imprecations. It was not by the eloquence of the *orator*, but by the cries and tears of the miſerable, that Cicero prevailed in that illuſtrious cauſe.

VERRES

VERRES fled from the oaths of his accuſers and their witneſſes, and not from the voice of TULLY; who, to preſerve the fame of his eloquence, publiſhed the five celebrated ſpeeches which were never delivered againſt the criminal, becauſe he had fled from the city, appalled with the ſight of the perſecuted and the oppreſſed.

It may be ſaid, that the caſes of Sicily and India are widely different; perhaps they may; whether they are or not is foreign to my purpoſe. I am not bound to deny the poſſibility of anſwers to ſuch queſtions; I am only vindicating *the right to aſk them.* Gentlemen, the author in the other paſſage which I marked out to your attention goes on thus:

" Sir John Macpherſon, and Lord Corn-
" wallis, his ſucceſſors in office, has given
" the ſame voluntary tribute of approba-
" tion to his meaſures as Governor Ge-
" neral of India. A letter from the former,
" dated the 10th of Auguſt, 1786, gives
" the following account of our dominions
" in Aſia: 'The native inhabitants of this
" kingdom are the happieſt and beſt pro-
" tected ſubjects in India; our native
" allies and tributaries confide in our pro-
tection;

" tection; the country powers are aſpiring
" to the friendſhip of the Engliſh; and
" from the King of Tidore, towards New
" Guinea, to Timur Shaw, on the banks
" of the Indus, there is not a ſtate that has
" not *lately* given us proofs of confidence
" and reſpect."

Still purſuing the ſame teſt of ſincerity, let us examine this defenſive allegation.

Will the Attorney General ſay that he does not believe ſuch a letter from Lord Cornwallis ever exiſted? No: For he knows that it is as authentic as any document from India upon the table of the Houſe of Commons. What then is the letter? The native inhabitants of this kingdom, ſays Lord Cornwallis, (writing from the very ſpot,) are the happieſt and beſt protected ſubjects in India, &c. &c. &c. The inhabitants of *this kingdom! Of what kingdom?* Why of the very kingdom which Mr. Haſtings had juſt returned from governing for thirteen years, and for the miſ-government and deſolation of which, he ſtands every day as a criminal, or rather as a ſpectacle, before us. This is matter for ſerious reflection; and fully entitles the author to put the queſtion which immediately follows:

" Does this authentic account of the admi-
" niſtration of Mr. Haſtings, and of the
" ſtate of India, correſpond with the
" gloomy picture of deſpotiſm and deſpair
" drawn by the Committee of Secrecy?"

Had that picture been even drawn by the Commons itſelf, he would have been fully juſtified in aſking this queſtion; but you obſerve it has no bearing on it; the laſt words not only entirely deſtroy that interpretation, but alſo the meaning of the very next paſſage, which is ſelected by the information as criminal, viz.

" What credit can we give to multiplied and
" accumulated charges, when we find that
" they originate from miſrepreſentation
" and falſehood?"

This paſſage, which is charged as a libel on the Commons, when thus compared with its immediate antecedent, can bear but one conſtruction. It is impoſſible to contend that it charges miſrepreſentation on the Houſe of Commons that found the impeachment, but upon the Committee of Secrecy juſt before adverted to, who were ſuppoſed to have ſelected the matter, and brought it before the whole Houſe for judgment.

I do

I do not mean, as I have often told you, to vindicate any calumny on that honorable Committee, or upon any individual of it, any more than upon the Commons at large; but the defendant is not charged by this information with any ſuch offences.

Let me here pauſe once more to aſk you, Whether the book in its genuine ſtate, as far as we have advanced in it, makes the ſame impreſſion on your minds now, as when it was firſt read to you in detached paſſages; and whether, if I were to tear off the firſt part of it which I hold in my hand, and give it to you as an entire work, the firſt and laſt paſſages which have been ſelected as libels on the Commons, would now appear to be ſo when blended with the interjacent parts. I do not aſk your anſwer. I ſhall have it in your verdict. The queſtion is only put to direct your attention in purſuing the remainder of the volume to this main point,—Is it an honeſt ſerious defence? For this purpoſe, and as an example for all others, I will read the author's entire anſwer to the firſt article of charge concerning Cheit Sing, the Zemindar of Benares, and leave it to your impartial judgments to determine, whether it be a mere cloak and cover for the ſlander imputed by the information to the concluding ſentence of it, which is the only part attacked; or whether, on the contrary, that con-

cluſion itſelf, when embodied with what goes before it, does not ſtand explained and juſtified?

" The firſt article of impeachment, (continues
" our author), is concerning Cheit Sing, the
" Zemindar of Benares. Bulwant Sing,
" the father of this Rajah, was merely an
" *Aumil*, or farmer and collector of the
" revenues for Sujah ul Dowlah, Nabob
" of Oude, and Vizir of the Mogul em-
" pire. When, on the deceaſe of his
" father, Cheit Sing was confirmed in the
" office of collector for the Vizir, he paid
" 200,000 pounds as a gift or nuzzeranah,
" and an additional rent of 30,000 pounds
" per annum.

" As the father was no more than an *Aumil*,
" the ſon ſucceeded only to his rights and
" pretenſions. But by a ſunnud granted
" to him by the Nabob Sujah Dowlah in
" September 1773, through the influence of
" Mr. Haſtings, he acquired a legal title to
" property in the land, and was raiſed
" from the office of *Aumil* to the rank of
" Zemindar.

" Zemindar. About four years after the
" death of Bulwant Sing, the Governor
" General and Council of Bengal obtained
" the ſovereignty paramount of the pro-
" vince of Benares. On the transfer of
" this ſovereignty the Governor and Coun-
" cil propoſed a new grant to Cheit Sing,
" confirming his former privileges, and
" conferring upon him the addition of the
" ſovereign rights of the mint, and the
" powers of criminal juſtice with regard to
" life and death. He was then recognized
" by the Company as one of their Zemin-
" dars; a tributary ſubject, or feudatory
" vaſſal, of the Britiſh empire in Indoſtan.
" The feudal ſyſtem, which was formerly
" ſuppoſed to be peculiar to our Gothic
" anceſtors, has always prevailed in the
" Eaſt. In every deſcription of that form
" of government, notwithſtanding acci-
" dental variations, there are two aſſoci-
" ations expreſſed or underſtood; one for
" internal ſecurity, the other for external
" defence. The King or Nabob, confers

 " protection

" protection on the feudatory baron as tri-
" butary prince, on condition of an annual
" revenue in the time of peace, and of
" military ſervice, partly commutable for
" money, in the time of war. The feudal
" incidents in the middle ages in Europe,
" the fine paid to the ſuperior on *marriage*,
" *wardſhip*, *relief*, &c. correſpond to the
" annual tribute in Aſia. Military ſervice
" in war, and extraordinory aids in the
" event of extraordinary emergencies, were
" common to both *.

" When

" * Notwithſtanding this analogy, the powers and pri-
" vileges of a Zemindar have never been ſo well
" aſcertained and defined as thoſe of a Baron in the
" feudal ages. Though the office has uſually deſcended
" to the poſterity of the Zemindar, under the ceremony
" of fine and inveſtiture, a material decreaſe in the
" cultivation, or decline in the population of the
" diſtrict, has ſometimes been conſidered as a ground
" to diſpoſſeſs him. When Zemindars have failed in
" their engagements to the ſtate, though not to the
" extent to juſtify expulſion, ſuperviſors have been
" often ſent into the Zemindaries, who have farmed
" out the lands, and exerciſed authority under the
" Duannee laws, independent of the Zemindar.
" Theſe circumſtances ſtrongly mark their *dependence*
" on the Nabob. About a year after the departure

" of

" When the Governor General of Bengal in " 1778, made an extraordinary demand on " the Zemindar of Benares for five lacks of " rupees, the Britiſh empire, in that part of " the world, was ſurrounded with enemies, " which threatened its deſtruction. In 1779, " a general confederacy was formed among " the great powers of Indoſtan for the ex- " pulſion of the Engliſh from their Aſiatic " dominions. At this criſis the expectation " of a French armament augmented the " general calamities of the country. Mr. " Haſtings is charged by the Committee, " with making his firſt demand under the

" of Mr. Haſtings from India, the queſtion concerning " the rights of Zemindars was agitated at great length " in Calcutta, and after the fulleſt and moſt accurate " inveſtigation, the Governor General and Council " gave it as their deliberate opinion to the Court of " Directors, that the property of the ſoil is not in the " Zemindar, but in the government; and that a Ze- " mindar is merely an officer of government appointed " to collect its revenues. Cheit Sing underſtood him- " ſelf to ſtand in this predicament. 'I am,' ſaid he, " on various occaſions, 'the ſervant of the Circar " (government), and ready to obey your orders.' The " name and office of Zemindar is not of Hindoo, but " Mogul inſtitution."

 " falſe

" falſe pretence that hoſtilities had com-
" menced with France. Such an inſidious
" attempt to pervert a meritorious action
" into a crime, is new even in the hiſtory
" of impeachments. On the 7th of July
" 1778, Mr. Haſtings received private
" intelligence from an Engliſh merchant at
" Cairo, that war had been declared by
" Great Britain on the 23d of March, and
" by France on the 30th of April. Upon
" this intelligence, conſidered as authentic,
" it was determined to attack all the French
" ſettlements in India. The information was
" afterwards found to be premature; but in
" the latter end of Auguſt, a ſecret diſpatch
" was received from England, authoriſing
" and appointing Mr. Haſtings to take the
" meaſures which he had already adopted in
" the preceding month. The Directors and
" the board of Controul have expreſſed
" their approbation of this tranſaction, by
" liberally rewarding Mr. Baldwyn, the
" merchant, for ſending the earlieſt intel-
" ligence he could procure to Bengal. It

" was

" was *two days* after Mr. Haſtings's infor-
" mation of the French war, that he
" formed the reſolution of exacting the
" five lacks of rupees from Cheit Sing, and
" would have made *ſimilar exactions* from
" all the dependencies of the Company in
" India, had they been in the ſame circum-
" ſtances. The fact is, that the great Ze-
" mindars of Bengal pay as much to
" Government as their lands can afford:
" Cheit Sing's collections were above fifty
" lacks, and his rent not twenty-four.

" The right of calling for extraordinary aids
" and military ſervice in times of danger
" being univerſally eſtabliſhed in India, as
" it was formerly in Europe during the
" feudal times, the ſubſequent conduct of
" Mr. Haſtings is explained and vindicated.
" The Governor General and Council of
" Bengal having made a demand upon a
" tributary Zemindar for three ſucceſſive
" years, and that demand having been re-
" ſiſted by their vaſſal, they are juſtified in
" his puniſhment. The neceſſities of the
" Company,

" Company, in conſequence of the critical
" ſituation of their affairs in 1781, calling
" for a high fine; the ability of the Ze-
" mindar, who poſſeſſed near two crores of
" rupees in money and jewels, to pay the
" ſum required; his backwardneſs to com-
" ply with the demands of his ſuperiors;
" his diſaffection to the Engliſh intereſt,
" and deſire of revolt, which even then
" began to appear, and were afterwards
" conſpicuous, fully juſtify Mr. Haſtings
" in every ſubſequent ſtep of his conduct.
" In the whole of his proceedings it is mani-
" feſt that he had not early formed a deſign
" hoſtile to the Zemindar, but was regu-
" lated by events which he could neither
" foreſee nor controul. When the neceſ-
" ſary meaſures which he had taken for
" ſupporting the authority of the Com-
" pany, by puniſhing a refractory vaſſal,
" were thwarted and defeated by the bar-
" barous maſſacre of the Britiſh troops, and
" the rebellion of Cheit Sing, the appeal
" was made to arms, an unavoidable revo-
" lution

" lution took place in Benares, and the
" Zemindar became the author of his own
" deſtruction.

Here follows the concluding paſſage, which is arraigned by the information.

" The deciſion of the Houſe of Commons on
" this charge againſt Mr. Haſtings, is one
" of the moſt ſingular to be met with in the
" annals of Parliament. The Miniſter,
" who was followed by the majority, vin-
" dicated him in every thing that he had
" *done*, and found him blameable only for
" what he *intended* to *do*; juſtified every
" ſtep of his *conduct*, and criminated his
" propoſed *intention* of converting the
" crimes of the Zemindar to the benefit of
" the ſtate, by a fine of fifty lacks of ru-
" pees. An impeachment of *error* in
" *judgment* with regard to the *quantum* of
" a fine, and for an *intention* that never was
" *executed*, and never known to the offend-
" ing party, characteriſes a tribunal *inqui-*
" *ſition* rather than a Court of Parliament."

Gentlemen,

Gentlemen, I am ready to admit that this ſentiment might have been expreſſed in language more reſerved and guarded; but you will look to the ſentiment itſelf, rather than to its dreſs; to the mind of the writer, and not to the bluntneſs with which he may happen to expreſs it. It is obviouſly the language of a warm man, engaged in the honeſt defence of his friend, and who is brought to what he thinks a juſt concluſion in argument, which perhaps becomes offenſive in proportion to its truth. Truth is undoubtedly no warrant for writing what is reproachful of any *private* man; for if a member of ſociety lives within the law, then if he offends it is againſt God alone, and man has nothing to do with him; and if he tranſgreſs the laws, the libeller ſhould arraign him before them, inſtead of preſuming to try him himſelf. But as to writings on *general ſubjects*, which are not charged as an infringement on the rights of individuals, but as of a ſeditious tendency, it is far otherwiſe.

When, in the progreſs either of legiſlation or of high national juſtice in Parliament, they who are amenable to no law, are ſuppoſed to have adopted through miſtake or error a principle which, if drawn into precedent, might be dangerous to the public; I ſhall not admit it to be a libel *in the courſe of a legal and bona fide publication*, to ſtate that ſuch a principle had *in fact* been adopted; for the people of England are not to be kept in the dark, touching

touching the proceedings of their own repreſentatives. Let us therefore coolly examine this ſuppoſed offence, and ſee what it amounts to.—

Firſt, Was not the conduct of the Right Honorable Gentleman, whoſe name is here mentioned, exactly what it is repreſented? Will the Attorney General, who was preſent in the Houſe of Commons, ſay that it was not? Did not the miniſter vindicate Mr. Haſtings in what he *had done*, and was not his conſent to that article of the impeachment founded on the intention of levying a fine on the Zemindar for the ſervice of the ſtate, beyond the quantum which he the miniſter thought reaſonable?

What elſe is this but an impeachment of error in judgment, in the quantum of a fine.

So much for the firſt part of the ſentence, which, regarding Mr. Pitt only, is foreign to our purpoſe; and as to the laſt part of it, which imputes the ſentiments of the miniſter to the majority that followed him with their votes on the queſtion, that appears to me to be giving handſome credit to the majority for having voted from conviction and not from curteſy to the miniſter. To have ſuppoſed otherwiſe, I dare not ſay, would have been a more *natural* libel, but it would certainly have been a greater one—The ſum and ſubſtance therefore of the paragraph is only this: that an impeachment

ment for an error in judgment, is not conſiſtent with the theory or the practice of the Engliſh Government.—So SAY I.

I ſay without reſerve, ſpeaking merely in the abſtract, and not meaning to decide upon the merits of Mr. Haſtings' cauſe, that an impeachment for an error in judgment is contrary to the whole ſpirit of Engliſh criminal juſtice, which, though not binding on the Houſe of Commons, ought to be a guide to their proceedings. I ſay that their extraordinary juriſdiction of impeachment, ought never to be aſſumed to expoſe error, or to ſcourge misfortune, but to hold up a terible example to corruption and *wilful* abuſe of authority by extra legal pains.

If public men are always puniſhed with due ſeverity, when the ſource of their miſconduct appears to have been *ſelfiſhly*, *corrupt*, *and criminal*, the public can never ſuffer when their errors are treated with gentleneſs; for no man from ſuch protection to the magiſtrate can think lightly of the charge of magiſtracy itſelf, when he ſees, by the language of the ſaving judgment, that the only title to it is an honeſt and zealous intention.

Gentlemen, if at this moment, or indeed in any other in the whole courſe of our hiſtory, the people of .ngland were to call upon every man in this impeaching Houſe of Commons, who had given his

his voice on public queſtions, or acted in authority civil or military, to anſwer for the iſſues of our councils and our wars, and if honeſt ſingle intentions for the public ſervice were refuſed as anſwers to impeachments, we ſhould have many relations to mourn for, and many friends to deplore. For my own part, Gentlemen, I feel I hope for my country as much as any man that inhabits it: but I would rather ſee it fall, and be buried in its ruins, than lend my voice to wound any miniſter, or other reſponſible perſon, however unfortunate, who had fairly followed the lights of his underſtanding and the dictates of his conſcience for their preſervation.

Gentlemen, this is no theory of mine, it is the language of Engliſh law, and the protection which it affords to every man in office, from the higheſt to the loweſt truſts of Government.

In no one inſtance that can be named, foreign or domeſtic, did the Court of King's Bench ever interpoſe its extraordinary juriſdiction, by information againſt any magiſtrate for the wideſt departure from the rule of his duty, without *the plaineſt and cleareſt proof of corruption.* To every ſuch application, not ſo ſupported, the conſtant anſwer has been, Go to a Grand Jury with your complaint. God forbid that a magiſtrate ſhould ſuffer from an error in judgment, if his purpoſe was honeſtly to diſcharge his truſt. We cannot ſtop the ordinary courſe of juſtice; but wherever the

Court

Court has a diſcretion, ſuch a magiſtrate is entitled to its protection. I appeal to the noble Judge, and to every man who hears me, for the truth and univerſality of this poſition. And it would be a ſtrange ſoleciſm indeed to aſſert, that in a caſe where the ſupreme court of criminal juſtice in the nation would refuſe to interpoſe an *extraordinary* though a legal juriſdiction, on the principle that the ordinary execution of the laws ſhould never be exceeded, but for the puniſhment of malignant guilt, the Commons in their judicial capacity, growing out of the ſame conſtitution, ſhould reject that principle, and ſtretch them ſtill further by a juriſdiction ſtill more *eccentric*.—Many impeachments have taken place, becauſe the law *could not* adequately puniſh the objects of them; but whoever heard of one being ſet on foot becauſe the law upon principle *would not* puniſh them?—Many impeachments have been adopted for a higher example than a proſecution in the ordinary Courts, but ſurely never for a different example.—The matter therefore, in the offenſive paragraph, is not only an indiſputable truth, but a truth in the propagation of which we are all deeply concerned.

Whether Mr. Haſtings, in the inſtance, acted from corruption, or from zeal for his employers, is what I have nothing to do with; it is to be decided in judgment; my duty ſtops with wiſhing him, as I do, an honourable deliverance.—Whether the Miniſter or the Commons meant to found this article

article of the impeachment, on mere error without corruption, is likewiſe foreign to the purpoſe. The author could only judge from what was ſaid and done on the occaſion. He only ſought to guard the principle which is a common intereſt, and the rights of Mr. Haſtings under it; and was therefore juſtified in publiſhing, that an impeachment, founded in error in judgment, was to all intents and purpoſes illegal, unconſtitutional, and unjuſt.—Gentlemen, it is now time for us to return again to the work under examination.

The author, having diſcuſſed the whole of the firſt article through ſo many pages, without even the imputation of an incorrect or intemperate expreſſion, except in the concluding paſſage, the meaning of which I truſt I have explained, goes on with the ſame earneſt diſpoſition to the diſcuſſion of the ſecond charge reſpecting the princeſſes of Oude, which occupies eighteen pages, not one ſyllable of which the Attorney General has read, and on which there is not even a glance at the Houſe of Commons; the whole of this anſwer is indeed ſo far from being a mere cloak for the introduction of ſlander, that I aver it to be one of the moſt maſterly pieces of writing I ever read in my life: from thence he goes on to the charge of contracts and ſalaries, which occupies five pages more, in which *there is not a glance at the Houſe of Commons, nor a word read by the Attorney General*—He afterwards defends Mr. Haſtings

againſt the charges reſpecting the opium contracts. *Not a glance at the Houſe of Commons; not a word by the Attorney General.* And in ſhort, in this manner he goes on with the others to the end of the book.

Now is it poſſible for any human being to believe, that a man, having no other intention than to vilify the Houſe of Commons *(as this information charges)*, ſhould yet keep his mind thus fixed and ſettled as the needle to the pole, upon the ſerious merits of Mr. Haſtings defence, without ever ſtraying into matter even queſtionable, except in the two or three ſelected parts out of two or three hundred pages. This is a forbearance which could not have exiſted, if calumny and detraction had been the malignant objects which led him to the enquiry and publication. The whole fallacy therefore ariſes from holding up to view a few detached paſſages, and carefully concealing the general tenor of the book.

Having now finiſhed moſt, if not all of theſe *critical* obſervations, which it has been my duty to make upon this unfair mode of proſecution; it is but a tribute of common juſtice to the Attorney General, (and which my perſonal regard for him makes it more pleaſant to pay,) that none of my commentaries reflect in the moſt diſtant manner upon him; nor upon the Solicitor for the

the Crown, who ſits near me, who is a perſon of the moſt correct honor;—far from it. The Attorney General having orders to proſecute, in conſequence of the addreſs of the Houſe to his Majeſty, had no choice in the mode; no means at all of keeping the proſecutors before you in countenance, but by the courſe which has been purſued; but ſo far has he been from enliſting into the cauſe thoſe prejudices, which it is not difficult to ſlide into a buſineſs originating from ſuch exalted authority, he has honorably guarded you againſt them; preſſing indeed ſeverely upon my client, with the weight of his ability, but not with the glare and trappings of his high office.

Gentlemen, I wiſh that my ſtrength would enable me to convinceyou of the author's ſingleneſs of intention, and of the merit and ability of his work, by reading the whole that remains of it. But my voice is already nearly exhauſted; I am ſorry my client ſhould be a ſufferer by my infirmity; one paſſage however is too ſtriking and important to be paſſed over; the reſt I muſt truſt to your private examination. The author having diſcuſſed all the charges, article by article, ſums them all up with this ſtriking appeal to his readers.

" The authentic ſtatement of facts which has
" been given, and the arguments which have
" been employed, are, I think, ſufficient to

" vindicate the character and conduct of
" Mr. Haſtings, even on the maxims of
" European policy. When he was ap-
" pointed Governor General of Bengal, he
" was inveſted with a diſcretionary power
" to promote the intereſts of the India
" Company, and of the Britiſh empire in
" that quarter of the globe. The general
" inſtructions ſent to him from his con-
" ſtituents were, 'That in all your deli-
" berations and reſolutions, you make the
" ſafety and proſperity of Bengal your
" principal object, and fix your attention
" on the ſecurity of the poſſeſſions and
" revenues of the Company.' His ſuperior
" genius ſometimes acted in the ſpirit,
" rather than complied with the letter, of
" the law; but he diſcharged the truſt, and
" preſeved the empire committed to his
" care, in the ſame way, and with greater
" ſplendor and ſucceſs than any of his
" predeceſſors in office: his departure from
" India was marked with the lamentations
" of the natives and the gratitude of his
" countrymen;

" countrymen ; and on his return to Eng-
" land, he received the cordial congratu-
" lations of that numerous and reſpectable
" ſociety, whoſe intereſts he had promoted,
" and whoſe dominions he had protected
" and extended."

Gentlemen, if this be a wilfully falſe account of the inſtructions given to Mr. Haſtings for his government, and of his conduct under them, the author and publiſher of this defence deſerve the ſevereſt puniſhment, for a mercenary impoſition on the public. But if it be true that he was directed to make the ſafety and proſperity of Bengal the firſt object of his attention, and that under his adminiſtration it has been ſafe and proſperous ; if it be true that the ſecurity and preſervation of our poſſeſſions and revenues in Aſia was marked out to him as the great leading principle of his government, and that theſe poſſeſſions and revenues, amidſt unexampled dangers, have been ſecured and preſerved ; then a queſtion may be unaccountably mixed with your conſideration, much beyond the conſequence of the preſent proſecution, involving perhaps the merits of the impeachment itſelf which gave it birth ; a queſtion which the Commons, as proſecutors of Mr. Haſtings, ſhould in common prudence have avoided ; unleſs that, regretting the unwieldy length of their proceedings againſt him, they

wiſhed to afford him the opportunity of this ſtrange anomolous defence.—For although I am neither his counſel, nor deſire to have any thing to do with his innocence; yet in the collateral defence of my client, I am driven to ſtate matter which may be conſidered by many as hoſtile to the impeachment. For if our dependencies have been ſecured, and their intereſts promoted, I am driven in the defence of my client to remark, that it is mad and propoſterous to bring to the ſtandard of juſtice and humanity, the exerciſe of a dominion founded upon violence and terror. It may and muſt be true, that Mr. Haſtings has repeatedly offended againſt the rights and privileges of Aſiatic government, if he was the faithful deputy of a power which could not maintain itſelf for an hour, without trampling upon both: He may and muſt have offended againſt the laws of God and nature, if he was the faithful viceroy of an empire wreſted in blood from the people to whom God and nature had given it: He may and muſt have preſerved that unjuſt dominion over a timorous and abject nation, by a terrifying, overbearing, inſulting ſuperiority, if he was the faithful adminiſtrator of your government, which having no root in conſent or affection, no foundation in ſimilarity of intereſts, nor ſupport from any one principle which cements men together in ſociety, could only be upheld by alternate ſtratagem and force. The unhappy people of India, feeble and effeminate as they are from the ſoftneſs

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of their climate, and ſubdued and broken as they have been by the knavery and ſtrength of civilization, ſtill occaſionally ſtart up in all the vigour and intelligence of inſulted nature. To be governed at all, they muſt be governed with a rod of iron; and our empire in the Eaſt would over and over again have been loſt to Great Britain if civil ſkill and military proweſs had not united their efforts to ſupport an authority which heaven never gave, by means which it never can ſanction.

Gentlemen, I think I can obſerve that you are touched with this way of conſidering the ſubject; and I can account for it. I have not been conſidering it through the cold medium of books, but have been ſpeaking of man and his nature, and of human dominion, from what I have ſeen of them myſelf amongſt reluctant nations ſubmitting to our authority. I know what they feel, and how ſuch feelings can alone be repreſſed. I have heard them in my youth from a naked ſavage, in the indignant character of a prince ſurrounded by his ſubjects, addreſſing the Governor of a Britiſh colony, holding a bundle of ſticks in his hand, as the notes of his unlettered eloquence. "Who is it," ſaid the jealous ruler over the deſart encroached upon by the reſtleſs foot of Engliſh adventure—"Who is it that cauſes this "river to riſe in the high mountains, and to "empty itſelf into the ocean? Who is it that "cauſes to blow the loud winds of winter, and

" that calms them again in the ſummer? Who is " it that rears up the ſhade of theſe lofty foreſts, " and blaſts them with the quick lightning at his " pleaſure? The ſame being who gave to you a " country on the other ſide of the waters, and " gave our's to us; and by this title we will defend " it," ſaid the warrior, throwing down his tomo-hawk upon the ground, and raiſing the war ſound of his nation. Theſe are the feelings of ſubjugated man all round the globe; and depend upon it, nothing but fear will controul where it is in vain to look for affection.

Theſe reflections are the only antidotes to thoſe anathemas of ſuperhuman eloquence which have lately ſhook theſe walls that ſurround us; but which it unaccountably falls to my province, whether I will or no, a little to ſtem the torrent of; by reminding you that you have a mighty ſway in Aſia, which cannot be maintained by the finer ſympathies of life, or the practice of its charities and affections: What will they do for you when ſurrounded by two hundred thouſand men with artillery, cavalry, and elephants, calling upon you for their dominions which you have robbed them of? Juſtice may, no doubt, in ſuch a caſe forbid the levying of a fine to pay a revolting ſoldiery: a treaty may ſtand in the way of encreaſing a tribute to keep up the very exiſtence of the government; and delicacy for women may forbid all entrance into a Zenana for money, whatever may be the

the neceſſity for taking it.—All theſe things muſt ever be occurring. But under the preſſure of ſuch conſtant difficulties, ſo dangerous to national honour, it might be better perhaps to think of effectually ſecuring it altogether, by recalling our troops and our merchants, and abandoning our Oriental empire. Until this is done, neither religion nor philoſophy can be preſſed very far into the aid of reformation and puniſhment. If England, from a luſt of ambition and dominion, will inſiſt on maintaining deſpotic rule over diſtant and hoſtile nations, beyond all compariſon more numerous and extended than herſelf, and gives commiſſion to her viceroys to govern them with no other inſtructions than to preſerve them, and to ſecure permanently their revenues; with what colour of conſiſtency or reaſon can ſhe place herſelf in the moral chair, and affect to be ſhocked at the execution of her own orders; adverting to the exact meaſure of wickedneſs and injuſtice neceſſary to their execution, and complaining only of *the exceſs as the immorality*, conſidering her authority as a diſpenſation for breaking the commands of God, and the breach of them as only puniſhable when contrary to the ordinances of man.

Gentlemen, ſuch a proceeding begets ſerious reflections. It would be better perhaps for the maſters and the ſervants of all ſuch governments, to join in ſupplication, that the great author

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of violated humanity may not confound them together in one common judgment.

Gentlemen, I find, as I ſaid before, I have not ſufficient ſtrength to go on with the remaining parts of the book. I hope, however, that notwithſtanding my omiſſions you are now compleatly ſatisfied, that whatever errors or miſconceptions may have miſled the writer of theſe pages, the juſtification of a perſon whom he believed to be innocent, and whoſe accuſers had appealed to the public, was the ſingle object of his contemplation. If I have ſucceeded in that object, every purpoſe which I had in addreſſing you has been anſwered.

It only now remains to remind you, that another conſideration has been ſtrongly preſſed upon you, and, no doubt, will be inſiſted on in reply. —You will be told, that the matters which I have been juſtifying as legal, and even meritorious, have therefore not been made the ſubject of complaint; and that whatever intrinſic merit parts of the book may be ſuppoſed or even admitted to poſſeſs, ſuch merit can afford no juſtification to the ſelected paſſages, ſome of which, even with the context, carry the meaning charged by the information, and which are indecent animadverſions on authority.

Gentlemen, to this I would anſwer (ſtill proteſting as I do againſt the application of any one of

of the innuendos,) that if you are firmly perſuaded of the ſingleneſs and purity of the author's intentions, you are not bound to ſubject him to infamy, becauſe, in the zealous career of a juſt and animated compoſition, he happens to have tripped with his pen into an intemperate expreſſion in one or two inſtances of a long work. If this ſevere duty were binding on your conſciences, the liberty of the preſs would be an empty ſound, and no man could venture to write on any ſubject, however pure his purpoſe, without an attorney at one elbow, and a counſel at the other.

From minds thus ſubdued by the terrors of puniſhment, there could iſſue no works of genius to expand the empire of human reaſon, nor any maſterly compoſitions on the general nature of government; by the help of which, the great commonwealths of mankind have founded their eſtabliſhments; much leſs any of thoſe uſeful applications of them to critical conjunctures, by which, from time to time, our own conſtitution, by the exertion of patriot citizens, has been brought back to its ſtandard.

Under ſuch terrors, all the great lights of ſcience and civilization muſt be extinguiſhed: for men cannot communicate their free thoughts to one another with a laſh held over their heads.

It is the nature of every thing that is great and uſeful, both in the animate and inanimate world, to be wild and irregular; and we muſt be contented to take them with their alloys which belong to them or live without them. Genius breaks from the fetters of criticiſm, but its wanderings are ſanctioned by its majeſty and wiſdom, when it advances in its path; ſubject it to the critic, and you tame it into dulneſs. Mighty rivers break down their banks in the winter, ſweeping away to death the flocks which are fattened on the ſoil that they fertilize in the ſummer: The few may be ſaved by embankments from drowning, but the flock muſt periſh for hunger. Tempeſts occaſionally ſhake our dwellings, and diſſipate our commerce; but they ſcourge before them the lazy elements, which without them would ſtagnate into peſtilence.

In like manner, Liberty herſelf, the laſt and beſt gift of God to his creatures, muſt be taken juſt as ſhe is; you may pare her down into baſhful regularity, and ſhape her into a perfect model of ſevere ſcrupulous law, but ſhe will be liberty no longer; and you muſt be content to die under the laſh of this inexorable juſtice which you have exchanged for the banner of freedom.

If it be aſked where the line to this indulgence and impunity is to be drawn; the anſwer is eaſy.

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The liberty of the preſs *on general ſubjects* comprehends and implies as much ſtrict obſervance of poſitive law as is conſiſtent with perfect purity of intention, and equal and uſeful ſociety; and what that latitude is, cannot be promulgated in the abſtract, but muſt be judged of in the particular inſtance, and conſequently upon this occaſion muſt be judged of by you, without forming any poſſible precedent for any other caſe; and where can the judgment be poſſibly ſo ſafe as with the members of that ſociety which alone can ſuffer if the writing is calculated to do miſchief to the public.

You muſt therefore try the book by that criterion, and ſay whether the publication was premature and offenſive, or, in other words, whether the publiſher was bound to have ſuppreſſed it until the public ear was anticipated and abuſed, and every avenue to the human heart or underſtanding ſecured and blocked up.

I ſee around me thoſe, by whom, by and by, Mr. Haſtings will be moſt ably and eloquently defended *; but I am ſorry to remind my friends, that but for the right of ſuſpending the public judgment concerning him till their ſeaſon of exertion comes round, the tongues of angels would be inſufficient for the taſk.

* Mr. Law, Mr. Plumer, and Mr. Dallas.

Gentlemen,

Gentlemen, I hope I have now performed my duty to my client; I ſincerely hope that I have; for, certainly, if ever there was a man pulled the other way by his intereſts and affections,—if ever there was a man who ſhould have trembled at the ſituation in which I have been placed on this occaſion; it is myſelf, who not only love, honour, and reſpect, but whoſe future hopes and preferments are linked from free choice with thoſe who, from the miſtakes of the author, are treated with great ſeverity and injuſtice.——Theſe are ſtrong retardments; but I have been urged on to activity by conſiderations, which can never be inconſiſtent with honourable attachments, either in the political or ſocial world; the love of juſtice and of liberty, and a zeal for the conſtitution of my country, which is the inheritance of our poſterity, of the public, and of the world.

Theſe are the motives which have animated me in defence of this perſon, who was an entire ſtranger to me; whoſe ſhop I never go to; and the author of whoſe publication, as well as Mr. Haſtings who is the object of it, I never ſpoke to in my life.

One word more, Gentlemen, and I have done. Every human tribunal ought to take care to adminiſter juſtice, as we look hereafter to have juſtice adminiſtered to ourſelves. Upon the principle which

which the Attorney General prays ſentence upon my client,—God have mercy upon us.—Inſtead of ſtanding before him in judgment with the hopes and conſolations of Chriſtians, we muſt call upon the mountains to cover us; for which of us can preſent for omniſcient examination, a pure, unſpotted and faultleſs courſe.—But I humbly expect that the benevolent Author of our being will judge us as I have been pointing out for your example. —Holding up the great volume of our lives in his hands, and regarding the general ſcope of them; if he diſcovers benevolence, charity, and goodwill to man beating in the heart, where he alone can look;—if he finds that our conduct, though often forced out of the path by our infirmities, has been in general well directed; his all-ſearching eye will aſſuredly never purſue us into thoſe little corners of our lives, much leſs will his juſtice ſelect them for puniſhment, without the general context of our exiſtence; by which faults may be ſometimes found to have grown out of virtues, and very many of our heavieſt offences to have been grafted by human imperfection, upon the beſt and kindeſt of our affections. No, gentlemen, believe me, this is not the courſe of divine juſtice, or there is no truth in the Goſpels of Heaven.— If the general tenor of a man's conduct be ſuch as I have repreſented it, he may walk through the ſhadow of death, with all his faults about him, with as much chearfulneſs as in the common paths of life; becauſe he knows, that inſtead of a

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ſtern accuſer to expoſe before the author of his nature thoſe frail paſſages, which like the ſcored matter in the book before you chequers the volume of the brighteſt and beſt-ſpent life, his mercy will obſcure them from the eye of his purity, and our repentance blot them out for ever.

All this would I admit be perfectly foreign, and irrelevant, if you were ſitting here in a caſe of property between man and man, where a ſtrict rule of law muſt operate, or there would be an end in that caſe of civil life and ſociety.

It would be equally foreign, and ſtill more irrelevant, if applied to thoſe ſhameful attacks upon private reputation which are the bane and diſgrace of the preſs; by which whole families have been rendered unhappy during life, by aſperſions cruel, ſcandalous and unjuſt. *Let* SUCH LIBELLERS *remember, that no one of my principles of defence can at any time or upon any occaſion ever apply to ſhield* THEM *from puniſhment;* becauſe ſuch conduct is not only an infringement of the rights of men, as they are defined by ſtrict law, *but is abſolutely incompatible with honor, honeſty, or miſtaken good intention.*

On ſuch men let the Attorney General bring forth all the artillery of his office, and the thanks and bleſſings of the whole public will follow him.

But

But this is a totally different caſe. Whatever private calumny may mark this work, it has not been made the ſubject of complaint, and we have therefore nothing to do with that, nor any right to conſider it.

We are trying whether the public could have been conſidered as offended and endangered, if Mr. Haſtings himſelf, in whoſe place the author and publiſher have a right to put themſelves, had, under all the circumſtances which have been conſidered, compoſed and publiſhed the volume under examination. That queſtion cannot in common ſenſe be any thing reſembling *a queſtion of* LAW, but is a pure queſtion of FACT, to be decided on the principles which I have humbly recommended. I therefore aſk of the Court, that the book itſelf may now be delivered to you. Read it with attention, and as you find it pronounce your verdict.

REPLY.

MR. ATTORNEY GENERAL.

Gentlemen of the Jury,

MY learned friend and I ſtand very much contraſted with each other in this cauſe.—To him belong infinite eloquence, great ingenuity, and power of perſuaſion, beyond that which I almoſt ever knew fall to any man's ſhare, and a power of language greater than that which ever met my ear.

In his ſituation, it is not only permitted to him, but it is commendable in him, it is his duty to his client, to exert all thoſe faculties, to comprehend every poſſible topic that by the utmoſt ſtretch of ingenuity can poſſibly be introduced into the moſt remote connection with this cauſe. I on the other hand, gentlemen, muſt diſclaim thoſe qualities which I aſcribe to my learned friend—namely, that ingenuity, that eloquence, and that power of words; but if they did belong to me, we ſtand contraſted alſo in this circumſtance, that I durſt not in my preſent ſituation uſe them, whatever little

little effort I might make to that effect in a private cauſe, and acting the part ſimply of an advocate—yet all that I muſt abandon, by recollecting the ſituation in which I ſtand, which is not that ſimply of an advocate.

Gentlemen, however unworthily, ſo it is, that I ſtand in the ſituation of, I believe I may ſay, the firſt officer of his Lordſhip's Court; therefore the utmoſt plain dealing, the plaineſt common ſenſe, and cleareſt argument that I can uſe, the utmoſt bona fide's with the Court and Jury, are the duties incumbent upon me.

In that ſpirit therefore, gentlemen, you will not expect from me the diſcharge of my duty, in any other way than by the moſt temperate obſervation, and by the moſt correct and the faireſt reaſoning in my power.

One ſhould have thought from the general turn of my learned friend's arguments, that I had in this information imputed it as a crime to the deceaſed gentleman whom he has named, and whom I think I hardly recollect ever to have heard named before, that I had imputed it to him as an offence, merely that he reaſoned in defence of Mr. Haſtings ably and eloquently, as is aſſerted.

My learned friend has ſaid, that I have picked out paſſages here and there diſconnected and diſ-

jointed, and have omitted a vaſt variety of other paſſages. I hardly think that the ſecond obſervation would have been made, had it not been for the ſake of his firſt, but inaſmuch as I ſtudiouſly avoided and would inſert no one ſingle line that conſiſted of fair reaſoning and defence for Mr. Haſtings, inaſmuch as it was no part of my duty ſo to do; he has exculpated me by ſaying, that loading an information with that which was not immediately to the point, was a thing which I avoided with propriety.

This book, as my learned friend himſelf has deſcribed it to you, and read the greater part, conſiſts of many different heads; it conſiſts of an hiſtorical narration of facts, with that I do not quarrel.—It conſiſts of extracts from original papers, with that I do not quarrel.—It conſiſts of arguments, of reaſoning, and of very good declamation, with that I do not quarrel.—But it conſiſts alſo of a ſtain, and a deep ſtain, upon your repreſentatives in Parliament.

My learned friend ſays that this is written with a friendly zeal for Mr. Haſtings. I commend that zeal; but at the ſame time you will permit me to diſtinguiſh, if that could avail, between the zeal of an author for Mr. Haſtings, and the cold lucrative motives of the printer of that author's work. It is the duty of that printer to have that work reviſed by ſome one elſe, if he has not the capacity

capacity to do it himſelf, to ſee that poiſon does not circulate among the public. It is his bounden duty to do that; zeal cannot excuſe or exculpate the author, much leſs the mechanical printer; though perhaps if this had been ſhewn in manuſcript as the work of a zealous friend, great allowance might have been made for that zeal.

My learned friend, for the purpoſes of argument, deviated into almoſt every field that it was poſſible for knowledge ſuch as his—for reading, experience, knowledge of human nature, and every thing that belongs to it; he has deviated into it at great length, and nine tenths of his argument conſiſted of it. Inſtead of that, what is this queſtion —the coldeſt, the dulleſt, the drieſt of all poſſible queſtions; it is neither more nor leſs than this, Whether when the great tribunal of the nation is carrying on its moſt ſolemn proceeding, for the benefit and for the intereſts of the nation, while that is depending, and not yet finally concluded, the accuſers, the Houſe of Commons, who carry up their impeachment to the Houſe of Lords, are ſlandered by being called perſons acting from private and intereſted animoſity; perſons who ſtudiouſly, when they find a meritorious ſervant of the country come home crowned with laurels, (as it is expreſſed,) are ſure to do what? To impeach and to ruin him.

I ſhall alſo ſtudiouſly avoid any thing reſpecting politics or party. I ſhall ſtudiouſly avoid any thing reſpecting the conduct of any men in another place; and my learned friend will excuſe me alſo, if I don't ſtate my own.

Theſe I avoid for this reaſon, that when we are within theſe walls, we are to betake ourſelves to the true and genuine principles of our law and conſtitution; it is not that a picture of oppreſſion of one man is to juſtify the calumniating other men; it will juſtify the defending that man, but it will not juſtify a ſtain upon the Houſe of Commons of this country. And, gentlemen, ſurely this author, conſiderable as he is as a man acquainted with compoſition, betrays himſelf the cauſe of Mr. Haſtings, as I ſhould think; at leaſt he does Mr. Haſtings no ſervice, by deſerting and abandoning the declamation, and the reaſoning of which he ſeems to be a conſiderable maſter, and deviating into ſlander and calumny upon the Houſe of Commons, the accuſers of that gentleman.

My learned friend has uſed an analogy, and he ſays the Houſe of Commons is a Grand Jury; I cloſe with him in that analogy; I aſk you, as lovers of good order, as men deſirous of repreſſing licentiouſneſs, as perſons who wiſh that this country ſhould be decently and well governed, whether you would endure for an inſtant, if this were an information againſt a defendant, who publiſhed that

that a Grand Jury found that bill, not becauſe they thought it a right thing that the perſon accuſed ſhould be put upon his trial, but that they found the indictment againſt him becauſe he was meritorious, that they did it from principles of private animoſity, and not with a regard to public juſtice.

If an indictment was brought before you for a ſlander of that ſort upon a Grand Jury, could you heſitate an inſtant, in ſaying that it was reprehenſible, and a thing not to be endured? why then, if the whole repreſentatives of the nation are acting in that capacity, if after many years inveſtigation they bring charges againſt any individual, is it any apology, juſtification it cannot be, for the author of this in his zeal for his friend, to tack to it that which muſt be a diſgrace to the country if it is true, and therefore muſt not be circulated by any perſon whatever.

The commendation which even my learned friend has beſtowed upon this work, the paſſionate and animated manner in which he has recommended it to your peruſal, and that of every man in the country, moſt manifeſtly proves what I ſtated in opening this cauſe; which was, that when ſuch miſchief as this is in a book, written by a perſon of no mean abilities, it comes recommended to, and in fact miſleads the beſt underſtandings in the country. I leave any man to judge of what muſt

be the miſchievous tendency of that, compared with the ſquibs, paragraphs, and idle traſh of the day, which frequently die away with that day. Upon this principle certainly it was that thoſe paſſages which I ſelected and put into this information, and which immediately regard the Houſe of Commons, naturally gave offence to the Houſe: they felt themſelves calumniated and aſperſed, and deſerving redreſs from a Jury.

My learned friend ſays—Why don't the Houſe of Commons themſelves puniſh it? Is that an argument to be uſed in the mouth of one who recommends clemency? Does he recommend the iron hand of power coming down upon a man of this ſort, and not temperately, wiſely, judiciouſly bow to the common law of this country, and ſay let him be dealt with by that common law?—There he will have a ſcrupulouſly impartial trial; there he will have every advantage that the meaneſt ſubject of the country is intitled to.

But, ſays my learned friend, paſſages are ſelected from diſtant pages and tacked together; the context between muſt explain the meaning of thoſe paſſages; and he compares it to taking one half of a ſentance, and tells you that if any man ſhould ſay, there is no God, taking that part alone, he would be a blaſphemer; taking the whole verſe, that the fool hath ſaid in his heart there is no God, in that ſenſe it becomes directly the reverſe of blaſphemy—Now has he found any one garbled

ſentence

ſentence in the whole courſe of this information? Is not every one a clear, diſtinct, and ſeparate propoſition?

On the contrary, when he himſelf accuſes me, not perſonally but officially, of not having ſtated the whole of this volume upon record, and undertaking to ſupply my defects, he miſſes this very ſentence:

"Aſſertions ſo hardy, and accuſations ſo "atrocious, ought not to have been introduced into the preamble of an impeachment, before an aſſembly ſo reſpectable as the Houſe of Peers, without the "cleareſt and moſt uncontrovertible evidence. In all tranſactions of a political "nature there are many concealed movements that eſcape the detection of the "world; but there are ſome facts ſo broad "and glaring, ſo conſpicuous and prominent, as to ſtrike the general eye, and "meet the common level of the human "underſtanding."

Now, Gentlemen, I only adduce this to ſhew, that it is poſſible that two leaves may be turned over

over at once, on the defendant's ſide of the queſtion; and likewiſe to ſhew you that I have not, for the purpoſe of accuſation, culled and picked out every paſſage that I might have picked out, or every one that would bear an offenſive conſtruction; but have taken thoſe prominent parts where this author has abandoned the purpoſe my learned friend aſcribes to him, that of extenuating the guilt imputed to Mr. Haſtings, and of ſhewing that he had merit with the public, rather than demerit; and to ſhew that I have betaken myſelf to the fifth head of his work, as I enumerated them before, where he does not content himſelf with executing that purpoſe, but holds out the Houſe of Commons as perſons actuated by private malice, not only in the eyes of the ſubjects of this country, but alſo to ſurrounding nations, whoſe eyes are unqueſtionably upon this country, throughout the whole courſe of the proceeding.

I would aſk you, whether any reaſonable anſwer has been given to the interpretation, which I put upon the various paſſages in this book?

The firſt of them, I admit with my learned friend, is ſimply an introduction; and is ſtated in the information, merely to ſhew that the author himſelf knew the poſition and ſtate of things; that the impeach ment had been carried up to the Houſe of Lords, and was there depending for their judgment.

Then

Then, after having reaſoned ſomewhat upon the introduction to theſe ſeveral articles of impeachment, and after having ſtated that theſe had been circulated in India, he goes on to ſay,

" Will accuſations, built upon ſuch a baſeleſs
" fabric, prepoſſeſs the public in favor of
" the impeachment? What credit can we
" give to multiplied and accumulated
" charges, when we find that they ori-
" ginate from miſrepreſentation and falſ-
" hood?"

My learned friend himſelf told you, in a ſubſequent part of his ſpeech, that thoſe accuſations originated from an inquiry which laſted two years and a half by a Secret Committe of the Houſe of Commons, (of which I myſelf was a pretty laborious member;) if that be ſo, what pretence is there here for impregnating the public with a belief, that from falſe, ſcandalous and fabricated materials, thoſe charges did originate? Is not that giving a directly falſe impreſſion to the public from that which is true? Are not thoſe to be protected from ſlander of this ſort, who take ſo much pains to inveſtigate what appears to them in the reſult to be a fit matter not for them to decide ultimately upon, but to put in a courſe of trial, where ultimately juſtice will be done.

Has

Has my learned friend attempted any explanation, or other interpretation, to be put upon these words, than that which the information imputes?

" If after exerting all your efforts in the cause
" of your country, you return covered with
" laurels, and crowned with success; if
" you preserve a loyal attachment to your
" Sovereign, you may expect the thun-
" ders of parliamentary vengeance;—you
" will certainly be impeached and proba-
" bly be undone."

Is it to be said, and circulated in print all over the world, that the House of Commons is composed of such materials that exactly in proportion to a man's merit is their injustice and inhuman tyranny—Is that to be said or printed freely, under the pretext that the author is zealous in the interest of a gentleman under misfortune?

But it is said there are forty libels every day published against this gentleman, and no one is permitted to defend him:—Let all mankind defend him:—Let every man that pleases write what he will, provided he does it within the verge of the law, if he does it as a manly and good subject, confining himself to reasonable and good argument.

My

My learned friend ſays, If you ſtop this, the preſs is gagged; that it never can be ſaid with impunity, that the King and the conſtable are in the ſame predicament.—The King and the conſtable are in one reſpect in the ſame perdicament, with infinite difference in the gradition, and an infinite difference in the compariſon; but without all queſtion, both are magiſtrates: the one the higheſt, to whom we look with awe and reverence; but though of the ſame genus, not of the ſame ſpecies; that may be everlaſtingly ſaid in this country, and everlaſtingly will be ſaid.

But is this the way to ſecure the liberty of the preſs, that at the time when the nation is ſolemnly engaged in the inveſtigation of the conduct of one of its firſt ſervants, that that ſervant ſhould not only be defended by fair argument and reaſon, as far as it goes, but that his accuſers are to be charged with malice and perſonal animoſity againſt that individual?

If the audacious voice of ſlander ſhould go ſo high as that, who is there that will ever undertake to be an accuſer in this country. I am ſure I for one, who ſometimes am called upon (I hope as ſparingly as public exigency will admit of to exerciſe that odious and diſagreeable taſk), would with pleaſure ſacrifice my gown, if I ſaw it eſtabliſhed that even the higheſt accuſers that this country knows are under the pretence of the defence of an individual

individual to be vilified as theſe accuſers are: Can ſubordinate accuſers expect to eſcape?

Gentlemen, give me leave again to remind you, that nothing can ever ſecure a valuable bleſſing ſo effectually as by enforcing the temperate, legal, and diſcrete uſe of it; and it cannot be neceſſary for the liberty of the preſs, that it ſhould be licentious to ſuch an extreme. Believe me, that if this country ſhould be worked up, as I expreſſed it yeſterday, to a paroxyſm of diſguſt againſt the licentiouſneſs of the preſs, which has attacked all ranks of men, and now at laſt has mounted up to the legiſlative body, perhaps it never can be in greater danger; and ſomething may be done in that paroxyſm of diſguſt that may be the gradual means of ſapping the foundation of that beſt of our liberties.

Is it not obvious to common ſenſe, that if the whole country is rendered indignant by the licentiouſneſs of the preſs knowing no bounds, that that is the inſtant of its greateſt hazard? Beſides, is the folly of the ſubjects of Great Britain ſuch, that in order to enjoy a thing in all its perfection, and to all its good purpoſes, it is neceſſary to encourage its extremeſt licentiouſneſs? If you do encourage its extremeſt licentiouſneſs, and this I venture to call ſuch, when the great accuſatorial body of the nation is ſlandered in this manner: if you give it that encouragement to day, no man can tell where it will reach this day twelvemonth.

Therefore

Therefore, ſo far from cramping the preſs, ſo far from ſapping its foundation, ſo far from doing it an injury; on the contrary, you are taking the ſureſt means to preſerve it, by diſtinguiſhing the two parts of this book, and by ſaying, True it is that any man is at liberty to expound and to explain the conduct of another; to juſtify it if he pleaſes in print, by ſtating in a manly way that which belongs to his ſubject; but the moment that he ſteps aſide, and ſlanders an individual, much more the awful body of the repreſentatives of the people, there he has done wrong; he has treſpaſſed upon the liberty of the preſs, and has imminently hazarded its exiſtence as far as in him lay.

Gentlemen, lay your hands upon your hearts, aſk yourſelves as men of honour, becauſe I know that binds you as much as your oaths; aſk yourſelves, whether the true meaning of this libel is not, that not from public grounds, not from conviction, not with a view to render public ſervice, but from private pique, from private malice, from bye motives, which I call corruption, the Houſe of Commons have been induced to ſend this Gentleman to an enquiry before the proper tribunal, and that too as the libel expreſſes it, without even reading it, without conſideration, without hearing. Judge I ſay, whether that be not the true expoſition of this libel, and then, Gentlemen, conſider with yourſelves what the effect will be, if you ratify and confirm ſuch a libel, by ſuffering this defendant to eſcape.

SUMMING

SUMMING UP.

Lord Kenyon.

Gentlemen of the Jury,

I DO not feel that I am called upon to diſcuſs the nature of this libel, or to ſtate to you what the merit of the compoſition is, or what the merit of the argument is, but merely to ſtate what the queſtions are, to which you are to apply your judgment, and the evidence given in ſupport of this information.

It is impoſſible when one reads the preface to this information, which ſtates that the libel was written to aſperſe the Houſe of Commons, not to feel that it is a matter of conſiderable importance; for I don't know how far a fixed general opinion that the Houſe of Commons deſerves to have crimes imputed to it, may go; for men that are governed, will be much influenced by the confidence repoſed in the governors; mankind will never forget that governors are not made for the ſake of themſelves, but are placed in their reſpective ſtations, to diſcharge the functions of their

their office for the ſake of the public, and if they ſhould ever conceive that the governors are ſo inattentive to their duty, as to exerciſe their functions to keep themſelves in power, and for their own emolument, without attending to the intereſts of the public, government muſt be relaxed, and at laſt crumble to duſt; and therefore if the caſe is made out, which is imputed to the defendant, it is no doubt a moſt momentous caſe indeed; but though it is ſo, it does not follow that the defendant is guilty; and Juries have been frequently told, and I am bound in the ſituation in which I ſtand, to tell you, that in forming your judgment upon this caſe, there are two points for you to attend to, namely:

Whether the defendant, who is charged with having publiſhed this, did publiſh it; and

Whether the ſenſe which the Attorney General, by his innuendo's in this information, has affixed to the different paſſages, is fairly affixed to them.

From any conſideration as to the firſt of theſe points you are delivered, becauſe it is admitted that the book was publiſhed by the defendant; but the other is the material point to which you are to apply your judgment. It has been entered into with wonderful abilities, much in the detail; but it is not enough for a man to ſay, I am inno-

cent;—it belongs to the great ſearcher of hearts to know whether men are innocent or not; we are to judge of the guilt or innocence of men, (becauſe we have no other rule to go by) by their overt acts, from what they have done.

In applying the innuendos, I accede intirely to what was laid down by the Counſel for the Defendant, and which was admitted yeſterday by the Attorney General, as Counſel for the Crown, that you muſt, upon this information, make up your minds, that this was meant as an aſperſion upon the Houſe of Commons—and I admit alſo, that in forming your opinion, you are not bound to confine your enquiry to thoſe detached paſſages which the Attorney General has ſelected as offenſive matter, and the ſubject of proſecution.

But let me on the other ſide warn you, that though there may be much good writing, good argument, morality and humanity in many parts of it, yet if there are offenſive paſſages, the good part will not ſanctify the bad part.

Having ſtated that, I ought alſo to tell you, that in order to ſee what is the ſenſe, to be fairly imputed to thoſe paſſages that are culled out as the offenſive paſſages, you have a right to look at all the context; you have a right to look at the whole book; and if you find it has been garbled, and that the paſſages ſelected by the Attorney General do not bear the ſenſe imputed to them, the man has

has a right to be acquitted; and God forbid he ſhould be convicted.

It is for you, upon reading the information, which if you go out of Court you will undoubtedly take with you, comparing it with this pamphlet, to ſee whether the ſenſe the Attorney General has affixed, is fairly affixed; always being guided by this, that where it is truly ambiguous and doubtful, the inclination of your judgment ſhould be on the ſide of innocence; but if you find you cannot acquit him without diſtorting ſentences you are to meet this caſe, and all other caſes as I ſtated yeſterday, with the fortitude of men, feeling that they have a duty upon them ſuperior to all leaning to parties; namely, adminiſtering juſtice in the particular cauſe.

It would be in vain for me to go through this pamphlet which has been juſt put into my hand, and to ſay whether the ſenſe affixed is the fair ſenſe or not. As far as diſcloſed by the information, theſe paſſages afford a ſtrong bais, that the ſenſe affixed to them is the fair ſenſe; but of that you will judge, not from the paſſages themſelves merely, but by reading the context or the whole book, ſo much at leaſt as is neceſſary to enable you to aſcertain the true meaning of the author.

If I were prepared to comment upon the pamphlet, in my ſituation it would be improper for me

to do it; my duty is fulfilled when I point out to you what the queſtions are that are propoſed to your judgment, and what the evidence is upon the queſtions; the reſult is your's and your's only.

The Jury withdrew for about two hours, when they returned into Court with a Verdict finding the Defendant

NOT GUILTY.

MR. STOCKDALE has ſubjoined to the foregoing account of his Trial, the following pages, as the moſt comprehenſive, as well as the lateſt thing extant, on the ſubject of criminal proceedings againſt Libels, and the province of the Jury in trying them: a ſubject which has long intereſted the Public, and been the ſubject of frequent controverſy.

The following argument was delivered by Mr. Erſkine, in the Court of King's Bench, on Wedneſday, November 15th, 1784, in ſupport of an application for a new trial for a ſuppoſed miſdirection of the Judge, * on the trial of the Dean of St. Aſaph, at Shrewſbury; the learned judge's charge to the jury, for the ſuppoſed error in which the application for a new trial, and the following argument in ſupport of it were made, is not inſerted: As it was only the

* Sir Francis Buller, Bart.

uſual charge in ſimilar caſes, in conformity to the eſtabliſhed practice of the Court of King's Bench, for ſome years before, viz. That the jury were bound to convict the publiſher on proof of the publication, and of the meaning imputed to it by the innuendos upon the record, however innocent or even meritorious they might conſider the matter publiſhed.

This doctrine, which did not originate with the great and venerable Earl Mansfield, but which had been adopted for ſome years before his time, is queſtioned by the following argument, as contrary to the more ancient law of England, and was delivered in reply to others never publiſhed. The doctrines however contained in it were over-ruled by the judgment of the Court of King's Bench; by which the confined province of the jury, to the finding of the publication, and the innuendos, was again eſtabliſhed to be law; the authority of which Mr. Stockdale does not preſume to diſpute. The arguments however, by which the contrary opinion may be maintained, have been

been conſidered by many of the greateſt lawyers in England to be too important to be loſt; and are the rather preſerved by Mr. Stockdale, as Mr. Erſkine, in his defence on his late Trial, inſiſted as formerly; and notwithſtanding theſe judgments to the contrary upon the right of the jury to acquit him upon what they ſhould find reſpecting his intention as publiſher, and their opinions of what he had publiſhed *.

* It is worthy of remark, that after the Dean of St. Aſaph had been convicted, on proof of the publication, according to the doctrine ratified as law by the Court of King's Bench, which ſhut out from both Judge and Jury at the trial the quality of the thing publiſhed, he was finally and completely diſcharged from the proſecution, by a motion made by Mr. Erſkine in arreſt of judgment. The Court unanimouſly declaring, That no Libel was ſtated on the record. Therefore, upon this principle, a perſon who has publiſhed nothing criminal, may be ſubjected to the expence and diſgrace of a conviction by his country; becauſe, as the law ſtands, a Judge cannot give his opinion on the queſtion of Libel, or no Libel, at the trial—we ſay cannot, becauſe the opinion of any particular judge, on this important ſubject, cannot be collected from his directions on a trial for a Libel. For a judge, until the law be otherwiſe declared by Parliament, may conſider his private judgment as bound by a ſeries of high and reſpectable deciſions.

ARGUMENT

IN SUPPORT OF

THE RIGHTS OF JURIES.

THE HON. T. ERSKINE.

I AM now to have the honour to addreſs myſelf to your Lordſhip, in ſupport of the rule granted to me by the Court upon Monday laſt, which, as Mr. Bearcroft has truly ſaid, and ſeemed to mark the obſervation with peculiar emphaſis, is a rule for a new trial. Much of my argument, according to his notion, points another way; whether its direction be true, or its force adequate to the object, it is now my buſineſs to ſhew.

In riſing to ſpeak at this time, I feel all the advantage conferred by the reply over thoſe whoſe arguments are to be anſwered; but I feel a diſadvantage likewiſe which muſt ſuggeſt itſelf to every intelligent mind.

In following the objections of ſo many learned perſons, offered in different arrangements upon a ſubject ſo complicated and comprehenſive, there is much danger of being drawn from that method and order which can alone faſten conviction upon unwilling minds, or drive them from the ſhelter which ingenuity never fails to find in the labyrinth of a deſultory diſcourſe.

The

The ſenſe of that danger, and my own inability to ſtruggle againſt it, led me originally to deliver to the court, certain written and maturely conſidered propoſitions, from the eſtabliſhment of which I reſolved not to depart, or to be removed, either in ſubſtance or in order, in any ſtage of the proceedings, and by which I muſt therefore this day unqueſtionably ſtand or fall.

Purſuing this ſyſtem I am vulnerable two ways, and in two ways only. Either it muſt be ſhewn that my propoſitions are not valid in law; or admitting their validity, that the learned judge's charge to the jury at Shrewſbury was not repugnant to them: there can be no other poſſible objections to my application for a new trial.

My duty to-day is therefore obvious and ſimple; it is, firſt, to re-maintain thoſe propoſitions; and then to ſhew, that the charge delivered to the jury at Shrewſbury was founded upon the abſolute denial and reprobation of them.

I begin therefore, by ſaying again in my own original words, that when a bill of indictment is found, or an information filed, charging any crime or miſdemeanor known to the law of England, and the party accuſed puts himſelf upon the country by pleading the general iſſue, not guilty:—the jury are GENERALLY charged with his deliverance from that CRIME, and not SPECIALLY from the fact or facts, in the commiſſion of which the indictment or information charges the crime to conſiſt;

conſiſt; much leſs from any ſingle fact, to the excluſion of others charged upon the ſame record.

Secondly, That no act which the law in its general theory holds to be criminal, conſtitutes in itſelf a crime abſtracted from the miſchievous intention of the actor. And that the intention, even where it becomes a ſimple inference of legal reaſon from a fact or facts eſtabliſhed, may, and ought to be collected by the jury, with the judge's aſſiſtance. Becauſe the act charged, though eſtabliſhed as a fact in a trial *on the general iſſue*, does not neceſſarily and unavoidably eſtabliſh the criminal intention by any ABSTRACT concluſion of law; the eſtabliſhment of the fact being ſtill no more than full evidence of the crime, but not the crime itſelf; unleſs the jury render it ſo themſelves, by referring it voluntarily to the court by ſpecial verdict.

Theſe two propoſitions, though worded with cautious preciſion, and in technical language, to prevent the ſubtlety of legal diſputation in oppoſition to the plain underſtanding of the world, neither do nor were intended to convey any other ſentiment than this, viz. that in all caſes where the law either directs or permits a perſon accuſed of a crime to throw himſelf upon a jury for deliverance, by pleading *generally* that he is not guilty; the jury, thus legally appealed to, may deliver him from the accuſation by a general verdict of acquittal (founded as in common-ſenſe it evidently muſt be) upon an inveſtigation as general

and

and comprehenſive as the charge itſelf from which it is a general deliverance.

Having ſaid this, I freely confeſs to the Court, that I am much at a loſs for any further illuſtration of my ſubject; becauſe I cannot find any matter by which it might be further illuſtrated, ſo clear, or ſo indiſputable, either in fact or in law, as the very propoſition itſelf which upon this trial has been brought into queſtion.

Looking back upon the ancient conſtitution, and examining with painful reſearch the original juriſdictions of the country, I am utterly at a loſs to imagine from what ſources theſe novel limitations of the rights of juries are derived. Even the bar is not yet trained to the diſcipline of maintaining them. My learned friend, Mr. Bearcroft, ſolemnly abjures them: he repeats to-day what he avowed at the trial, and is even jealous of the imputation of having meant leſs than he expreſſed; for, when ſpeaking this morning of the *right* of the jury to judge of the whole charge, your lordſhip corrected his expreſſion, by telling him he meant the *power*, and not the *right*; he caught inſtantly at your words, diſavowed your explanation, and, with a conſiſtency which does him honour, declared his adherence to his original admiſſion in its full and obvious extent.

"I did not mean," ſaid he, "merely to ac-
"knowledge that the jury have the *power*; for
"their

" their power nobody ever doubted; and, if a " judge was to tell them they had it not, they " would only have to laugh at him, and convince " him of his error, by finding a general verdict " which muſt be recorded: I meant, therefore, to " conſider it as a *right*, as an important privilege, " and of great value to the conſtitution."

Thus Mr. Bearcroft and I are perfectly agreed; I never contended for more than he has voluntarily conceded. I have now his expreſs authority for repeating, in my own former words, that the jury have not merely the *power* to acquit, upon a view of the whole charge, without controul or puniſhment, and without the poſſibility of their acquittal being annulled by any other authority; but that they have *a conſtitutional legal right to do it; a right fit to be exerciſed;* and intended by the wiſe founders of the government, to be a protection to the lives and liberties of Engliſhmen, againſt the encroachments and perverſions of authority in the hands of fixed magiſtrates.

But this candid admiſſion on the part of Mr. Bearcroft, though very honourable to himſelf, is of no importance to me, ſince, from what has already fallen from your lordſhip, I am not to expect a ratification of it from the court; it is therefore my duty to eſtabliſh it. I feel all the importance of my ſubject, and nothing ſhall lead me today to go out of it. I claim all the attention of the

the Court, and the right to ſtate every authority which applies in my judgment to the argument, without being ſuppoſed to introduce them for other purpoſes than my duty to my client, and the conſtitution of my country warrants and approves.

It is not very uſual, in an Engliſh court of juſtice, to be driven back to the earlieſt hiſtory and original elements of the conſtitution, in order to eſtabliſh the firſt principles which mark and diſtinguiſh Engliſh law: they are always aſſumed, and, like axioms in ſcience, are made the foundations of reaſoning without being proved. Of this ſort our anceſtors, for many centuries, muſt have conceived the right of an Engliſh jury to decide upon every queſtion which the forms of the law ſubmitted to their final deciſion; ſince, though they have immemorially exerciſed that ſupreme juriſdiction, we find no trace in any of the ancient books of its ever being brought into queſtion.

It is but as yeſterday, when compared with the age of the law itſelf, that judges, unwarranted by any former judgments of their predeceſſors, without any new commiſſion from the Crown, or enlargement of judicial authority from the legiſlature, have ſought to faſten a limitation upon the rights and privileges of jurors, totally unknown in ancient times, and palpably deſtructive of the very end and object of their inſtitution.

No

No fact, my Lord, is of more eaſy demonſtration; for the hiſtory and laws of a free country lie open even to vulgar inſpection.

During the whole Saxon æra, and even long after the eſtabliſhment of the Norman government, the whole adminiſtration of juſtice, criminal and civil, was in the hands of the people themſelves, without the controul or intervention of any judicial authority, delegated to fixed magiſtrates by the crown. The tenants of every manor adminiſtered civil juſtice to one another in the court-baron of their Lord; and their crimes were judged of in the leet, every ſuitor of the manor giving his voice as a juror, and the ſteward being only the regiſter, and not the judge.

On appeals from theſe domeſtic juriſdictions to the county-court, and to the torn of the ſheriff, or in ſuits and proſecutions originally commenced in either of them, the ſheriff's authority extended no further than to ſummon the jurors, to compel their attendance, miniſterially to regulate their proceedings, and to enforce their deciſions; and even where he was ſpecially empowered by the King's writ of *juſticies* to proceed in cauſes of ſuperior value, no *judicial* authority was thereby conferred upon himſelf, but only a more enlarged juriſdiction ON THE JURORS who were to try the cauſe mentioned in the writ.

It is true that the ſheriff cannot now intermeddle in pleas of the crown, but with this exception which brings no reſtrictions on juries, theſe juriſdictions remain untouched at this day; intricacies of property have introduced other forms of proceeding, but the conſtitution is the ſame.

This popular judicature was not confined to particular diſtricts, or to inferior ſuits and miſdemeanors, but pervaded the whole legal conſtitution; for, when the Conqueror, to increaſe the influence of his crown, erected that great ſuperintending court of juſtice in his own palace, to receive appeals criminal and civil from every court in the kingdom, and placed at the head of it the *Capitalis juſticianus totius Angliæ*, of whoſe original authority the chief juſtice of this court is but a partial and feeble emanation: even that great magiſtrate was in the *aula regis* merely miniſterial: every one of the king's tenants who owed him ſervice in right of a barony, had a ſeat and a voice in that high tribunal; and the office of juſticiar was but to record and to enforce their judgments.

In the reign of King Edward the Firſt, when this great office was aboliſhed, and the preſent courts at Weſtminſter eſtabliſhed by a diſtribution of its powers; the barons preſerved that ſupreme ſuperintending juriſdiction which never belonged

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to the juſticiar, but to themſelves only as the jurors in the king's court: a juriſdiction which, when nobility from being territorial and feodal became perſonal and honorary, was aſſumed and exerciſed by the peers of England, who, without any delegation of judicial authority from the crown, form to this day the ſupreme and final court of Engliſh law, judging in the laſt reſort for the whole kingdom, and ſitting upon the lives of the peerage, in their ancient and genuine character, as the pares of one another.

When the courts at Weſtminſter were eſtabliſhed in their preſent forms, and when the civilization and commerce of the nation had introduced more intricate queſtions of juſtice, the judicial authority in civil caſes could not but enlarge its bounds; the rules of property in a cultivated ſtate of ſociety became by degrees beyond the compaſs of the unlettered multitude, and in certain well-known reſtrictions undoubtedly fell to the judges; yet more perhaps from neceſſity than by conſent, as all judicial proceedings were artfully held in the Norman language, to which the people were ſtrangers.

Of theſe changes in judicature, immemorial cuſtom, and the acquieſcence of the legiſlature, is the evidence, which eſtabliſh the juriſdiction of the courts on the true principles of Engliſh law, and meaſure the extent of it by their ancient practice.

But no ſuch evidence is to be found of any the leaſt relinquiſhment or abridgment of popular judicature *in caſes of crimes;* on the contrary, every page of our hiſtory is filled with the ſtruggles of our anceſtors for its preſervation.

The law of property changes with new objects, and becomes intricate as it extends its dominion; but crimes muſt ever be of the ſame eaſy inveſtigation: they conſiſt wholly in intention, and the more they are multiplied by the policy of thoſe who govern, the more abſolutely the public freedom depends upon the people's preſerving the entire adminiſtration of criminal juſtice to themſelves.

In a queſtion of property between two private individuals, the crown can have no poſſible intereſt in preferring the one to the other: but it may have an intereſt in cruſhing both of them together in defiance of every principle of humanity and juſtice, if they ſhould put themſelves forward in a contention for public liberty againſt a government ſeeking to emancipate itſelf from the dominion of the laws. No man in the leaſt acquainted with the hiſtory of nations, or of his own country, can refuſe to acknowledge, that if the adminiſtration of criminal juſtice were left in the hands of the crown, or its deputies, no greater freedom could poſſibly exiſt than government might chooſe to tolerate from the convenience or policy of the day.

My

My Lord, this important truth is no diſcovery or aſſertion of mine, but is to be found in every book of the law: whether we go up to the moſt ancient authorities, or appeal to the writings of men of our own times, we meet with it alike in the moſt emphatical language. Mr. Juſtice Blackſtone, by no means biaſſed towards democratical government, having, in the third volume of his Commentaries, explained the excellence of the trial by jury in civil caſes, expreſſes himſelf thus: vol. 4. p. 349. "But it holds much "ſtronger in criminal caſes; ſince in times of "difficulty and danger, more is to be appre-"hended from the violence and partiality of "judges appointed by the crown, in ſuits be-"tween the king and the ſubject, than in diſ-"putes between one individual and another, to "ſettle the boundaries of private property. Our "law has, therefore, wiſely placed this ſtrong "and twofold barrier of a preſentment and trial "by jury, between the liberties of the people "and the prerogative of the crown: without "this barrier, juſtices of *oyer* and *terminer* named "by the crown, might, as in France or in "Turkey, impriſon, diſpatch, or exile, any man "that was obnoxious to government, by an in-"ſtant declaration that ſuch was their will and "pleaſure. So that the liberties of England "cannot but ſubſiſt ſo long as this palladium "remains ſacred and inviolate, not only from "all open attacks, which none will be ſo hardy

" as to make, but alſo from all ſecret machi-
" nations, which may ſap and undermine it."

But this remark, though it derives new force in being adopted by ſo great an authority, was no more original in Mr. Juſtice Blackſtone than in me, for the ſame expreſs reaſon: for the inſtitution and authority of juries is to be found in Bracton, who wrote above five hundred years before him. " The curia and the pares," ſays he, " were neceſſarily the judges in all caſes " of life, limb, crime and diſheriſon of the heir " in capite. The king could not decide, for " then he would have been both proſecutor and " judge; neither could his juſtices, for they re-" preſent him *."

Notwithſtanding all this, the learned judge was pleaſed to ſay at the trial, that there was no difference between civil and criminal caſes. I ſay, on the contrary, independent of theſe authorities, that there is not, even to vulgar obſervation, the remoteſt ſimilitude between them.

There are four capital diſtinctions between proſecutions for crimes, and civil actions, every one of which deſerves conſideration.

* Vide likewiſe Mr. Reeves' very ingenious Hiſtory of the Engliſh law.

Firſt, In the juriſdiction neceſſary to found the charge.

Secondly. In the manner of the defendant's pleading to it.

Thirdly, In the authority of the verdict which diſcharges him.

Fourthly, In the independence and ſecurity of the jury from all conſequences in giving it.

As to the firſt, it is unneceſſary to remind your Lordſhips, that, in a civil caſe, the party who conceives himſelf aggrieved, ſtates his complaint to the court, avails himſelf at his own pleaſure of its proceſs, compels an anſwer from the defendant by its authority, or taking the charge *pro confeſſo* againſt him on his default, is intitled to final judgment and execution for his debt, without any interpoſition of a jury. But in criminal caſes it is otherwiſe; the court has no cognizance of them, without leave from the people forming a grand inqueſt. If a man were to commit a capital offence in the face of all the judges of England; their united authority could not put him upon his trial: they could file no complaint againſt him, even upon the records of the ſupreme criminal court; but could only commit him for ſafe cuſtody, which is equally competent to every common juſtice of the peace: the grand jury alone could arraign him, and in their diſ-

cretion might likewiſe finally diſcharge him, by throwing out the bill, with the names of all your Lordſhips as witneſſes on the back of it.

If it ſhall be ſaid, that this excluſive power of the grand jury does not extend to leſſer miſdemeanors, which may be proſecuted by information; I anſwer, that for that very reaſon it becomes doubly neceſſary to preſerve the power of the other jury which is left.

But, in the rules of pleading, there is no diſtinction between capital and leſſer offences; and I venture to aſſert, that the defendant's plea of not guilty, which univerſally prevails as the legal anſwer to every information or indictment, as oppoſed to ſpecial pleas to the court in civil actions; and the neceſſity impoſed upon the crown to join the general iſſue, is abſolutely deciſive of the preſent queſtion.

Every lawyer muſt admit, that the rules of pleading were originally eſtabliſhed to mark and to preſerve the diſtinct juriſdictions of the court and the jury, by a ſeparation of the law from the fact wherever they were intended to be ſeparated. A perſon charged with owing a debt, or having committed a treſpaſs, &c. &c. if he could not deny the facts on which the actions were founded, was obliged to ſubmit his juſtification for matter of law by a ſpecial plea to the court upon the record; to which plea the plaintiff might demur,

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and ſubmit the legal merits to the judges. By this arrangement, no power was ever given to the jury, by an iſſue joined before them, but when a right of deciſion, as comprehenſive as the iſſue went along with it: for, if a defendant in ſuch civil actions pleaded the general iſſue inſtead of a ſpecial plea, aiming at a general deliverance from the charge, by ſhewing his juſtification to the jury at the trial; the court protected its own juriſdiction, by refuſing all evidence of the facts on which ſuch juſtification was founded.

The extenſion of the general iſſue beyond its ancient limits, and in deviation from its true principle, has introduced ſome confuſion into this ſimple and harmonious ſyſtem; but the law is ſubſtantially the ſame.

No man, at this day, in any of thoſe actions where the ancient forms of our juriſprudence are ſtill wiſely preſerved, can poſſibly get at the opinion of a jury upon any queſtion not intended by the conſtitution for their deciſion. In actions of debt, detinue, breach of covenant, treſpaſs, or replevin, the defendant can only ſubmit the mere fact to the jury; the law muſt be pleaded to the court: if, dreading the opinion of the judges, he conceals his juſtification under the cover of a general plea in hopes of a more favourable conſtruction of his defence at the trial; its very exiſtence can never even come within the knowledge of the jurors; every legal defence muſt ariſe out of

facts, and the authority of the judge is interpoſed, to prevent their appearing before a tribunal which, in ſuch caſes, has no competent juriſdiction over them.

By impoſing this neceſſity of pleading every legal juſtification to the court, and by this excluſion of all evidence on the trial beyond the negation of the fact, the courts indiſputably intended to eſtabliſh, and did in fact effectually ſecure the judicial authority over legal queſtions from all encroachment or violation; and it is impoſſible to find a reaſon in law, or in common-ſenſe, why the ſame boundaries between the fact and the law ſhould not have been at the ſame time extended to criminal caſes by the ſame rules of pleading, if the juriſdiction of the jury had been deſigned to be limited to the fact as in civil actions.

But no ſuch boundary was ever made or attempted; on the contrary, every perſon charged with any crime by an indictment or information, has been in all times from the Norman conqueſt to this hour, not only permitted, but even bound to throw himſelf upon his country for deliverance, by the general plea of not guilty; and may ſubmit his whole defence to the jury, whether it be a negation of the fact, or a juſtification of it in law: and the judge has no authority as in a civil caſe, to refuſe ſuch evidence at the trial, as out of the iſſue, and as *coram non judice*, an autho-

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rity which in common ſenſe he certainly would have, if the jury had no higher juriſdiction in the one caſe than in the other. The general plea thus ſanctioned by immemorial cuſtom, ſo blends the law and the fact together, as to be inſeparable but by the voluntary act of the jury in finding a ſpecial verdict: the general inveſtigation of the whole charge is therefore before them, and although the defendant admits the fact laid in the information or indictment, he, nevertheleſs, under his general plea, gives evidence of others which are collateral, referring them to the judgment of the jury, as a legal excuſe or juſtification, and receives from their verdict a compleat, general, and concluſive deliverance.

Mr. Juſtice Blackſtone, in the fourth volume of his Commentaries, page 339, ſays, "The "traiterous or felonious intent are the points "and very giſt of the indictment, and muſt be "anſwered directly by the general negative, not "guilty, and the jury will take notice of any "defenſive matter, and give their verdict ac-"cordingly, as effectually as if it were ſpecially "pleaded."

This, therefore, ſays Sir Matthew Hale, in his Pleas of the Crown, page 258, is, upon all accounts, the moſt advantageous plea for the defendant: "It would be a moſt unhappy caſe for "the judge himſelf if the priſoner's fate depended "upon his directions; unhappy alſo for the "priſoner:

" priſoner: for if the judge's opinion muſt " rule the verdict, the trial by jury would be " uſeleſs."

My Lord, the concluſive operation of the verdict when given, and the ſecurity of the jury from all conſequences in giving it, renders the contraſt between criminal and civil caſes ſtriking and compleat. No new trial can be granted as in a civil action: your Lordſhips, however you may diſapprove of the acquittal, have no authority to award one; for there is no precedent of any ſuch upon record, and the diſcretion of the court is circumſcribed by the law.

Neither can the jurors be attainted by the crown. In Buſhel's caſe, Vaughan's Reports, page 146, that learned and excellent judge expreſſed himſelf thus: " There is no caſe in all " the law of an attaint for the king, nor any " opinion but that of Thyrning's, 10th of Henry " IVth, title Attaint, 60 and 64, for which there " is no warrant in law, though there be other " ſpecious authority againſt it, touched by none " that have argued this caſe."

Lord Mansfield. To be ſure it is ſo.

Mr. Erſkine. Since that is clear, my Lord, I ſhall not trouble the court farther upon it: indeed I have not been able to find any one authority for ſuch an attaint but a dictum in Fitz-

Fitzherbert's Natura Brevium, page 107; and on the other hand, the doctrine of Buſhel's caſe is expreſsly agreed to in very modern times, vide Lord Raymond's Reports, 1ſt volume, page 469.

If then your Lordſhips reflect but for a moment upon this comparative view of criminal and civil caſes which I have laid before you; how can it be ſeriouſly contended, not merely that there is no difference, but that there is any the remoteſt ſimilarity between them. In the one caſe, the power of accuſation begins from the court; in the other, from the people only, forming a grand jury. In the one, the defendant muſt plead a ſpecial juſtification, the merits of which can only be decided by the judges; in the other, he may throw himſelf for general deliverance upon his country. In the firſt the court may award a new trial if the verdict for the defendant be contrary to the evidence or the law; in the laſt, it is concluſive and unalterable; and to crown the whole, the King never had that proceſs of attaint which belonged to the meaneſt of his ſubjects.

When theſe things are attentively conſidered, I might aſk thoſe who are ſtill diſpoſed to deny the right of the jury to inveſtigate the whole charge, whether ſuch a ſoleciſm can be conceived to exiſt in any human government; much leſs in the moſt refined and exalted in the world; as

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that a power of ſupreme judicature ſhould be conferred at random by the blind forms of the law where no right was intended to paſs with it, and which was upon no occaſion and under no circumſtance to be exerciſed; which, though exerted notwithſtanding in every age and in a thouſand inſtances, to the confuſion and diſcomfiture of fixed magiſtracy, ſhould never be checked by authority, but ſhould continue on from century to century, the revered guardian of liberty and of life, arreſting the arm of the moſt headſtrong government in the worſt of times, without any power in the crown or its judges, to touch without its conſent the meaneſt wretch in the kingdom, or even to aſk the reaſon and principle of the verdict which acquits him. That ſuch a ſyſtem ſhould prevail in a country like England, without either the original inſtitution or the acquieſcing ſanction of the legiſlature is impoſſible. Believe me, my Lord, no talents can reconcile, no authority can ſanction ſuch an abſurdity; the common ſenſe of the world revolts at it.

Having eſtabliſhed this important right in the jury beyond all poſſibility of cavil or controverſy, I will now ſhew your Lordſhip that its exiſtence is not merely conſiſtent with theory, but is illuſtrated and confirmed by the univerſal practice of all judges; not even excepting Mr. Juſtice Forſter himſelf, whoſe writings have been cited in ſupport of the contrary opinion. How a man expreſſes his abſtract ideas is but of little importance when an appeal can be made

made to his plain directions to others, and to his own particular conduct: but even none of his expreſſions when properly conſidered and underſtood militate againſt my poſition.

In his juſtly celebrated book on the criminal law, page 256, he expreſſes himſelf thus: "The "conſtruction which the law putteth upon fact "STATED AND AGREED OR FOUND by a jury, *is* "*in all caſes undoubtedly the proper province of the* "*court.*"

Now if the adverſary is diſpoſed to ſtop here, though the author never intended he ſhould, as is evident from the reſt of the ſentence, yet I am willing to ſtop with him, and to take it as a ſubſtantive propoſition; for the ſlighteſt attention muſt diſcover that it is not repugnant to any thing which I have ſaid. Facts *ſtated and agreed*, or facts *found* by a jury, which amounts to the ſame thing, conſtitute a ſpecial verdict; and who ever ſuppoſed that the law upon a ſpecial verdict was not the province of the court? Who ever denied, that where upon a general iſſue the parties chuſe to agree upon facts and to ſtate them; or the jury chuſe voluntarily to find them without drawing the legal concluſion themſelves, that in ſuch inſtances the court is to draw it? That Forſter meant nothing more than that the court was to judge of the law when the jury thus voluntarily prays its aſſiſtance by ſpecial verdict, is evident from his words which follow, for he immediately goes on to ſay; in caſes of doubt and REAL difficulty, it is therefore commonly recommended to the jury

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to ſtate facts and circumſtances in a ſpecial verdict: but neither here, nor in any other part of his works, is it ſaid or inſinuated that they are *bound* to do ſo but at their own free diſcretion: indeed, the very term *recommended*, admits the contrary, and requires no commentary. I am ſure I ſhall never diſpute the wiſdom or expediency of ſuch a recommendation in thoſe caſes of doubt, becauſe the more I am contending for the exiſtence of ſuch an important right, the leſs it would become me to be the advocate of raſhneſs and precipitation in the exerciſe of it.

It is no denial of juriſdiction to tell the greateſt magiſtrate upon earth to take good counſel in caſes of real doubt and difficulty. Judges upon trials, whoſe authority to ſtate the law is indiſputable, often refer it to be more ſolemnly argued before the court; and this court itſelf often holds a meeting of the twelve judges before it decides on a point upon its own records, of which the others have confeſſedly no cognizance till it comes before them by the writ of error of one of the parties.—Theſe inſtances are monuments of wiſdom, integrity, and diſcretion, but they do not bear in the remoteſt degree upon juriſdiction: the ſphere of juriſdiction is meaſured by what may or may not be decided by any given tribunal with legal effect, not by the rectitude or error of the deciſion. If the jury according to theſe authorities may determine the whole matter by their verdict, and if the verdict when given is not only final and unalterable, but muſt be enforced by the authority of the judges,

judges, and executed if reſiſted by the whole power of the ſtate; upon what principle of government or reaſon can it be argued not to be law? that the jury are in this exact predicament is confeſſed by Forſter; for he concludes with ſaying, that when the law is clear, the jury under the direction of the court in point of law *may*, and if they are well adviſed will, *always find a general verdict conformably to ſuch directions.*

This is likewiſe conſiſtent with my poſition: if the law be clear, we may preſume that the judge ſtates it clearly to the jury; and if he does, undoubtedly the jury, if they are well adviſed, will find according to ſuch directions; for they have not a capricious diſcretion to make law at their pleaſure, but are bound in conſcience as well as judges are to find it truly; and generally ſpeaking, the learning of the judge who preſides at the trial affords them a ſafe ſupport and direction.

The ſame practice of judges in ſtating the law to the jury, as applied to the particular caſe before them, appears likewiſe in the caſe of the King againſt Oneby, 2d Lord Raymond, page 1494. "On the trial the judge directs the jury thus: If you believe ſuch and ſuch witneſſes who have ſworn to ſuch and ſuch facts, *the killing of the deceaſed appears to be with malice prepenſe:* but if you do not believe them, then you ought to find him guilty of manſlaughter; and the jury may,

may, if they think proper, give a general verdict of murder or manſlaughter: *but if they decline* giving a general verdict, and *will* find the facts ſpecially, the court is then to form their judgment from the facts found, whether the defendant be guilty or not guilty, *i. e.* whether the act was done with malice and deliberation or not."

Surely language can expreſs nothing more plainly or unequivocally, than that where the general iſſue is pleaded to an indictment, the law and the fact are both before the jury; and that the former can never be ſeparated from the latter, for the judgment of the court, unleſs by their own ſpontaneous act: for the words are, "If "they decline giving a general verdict, and *will* "find the facts ſpecially, the court is THEN to "form their judgment from the facts found." So that after a general iſſue joined, the authority of the court only commences when the jury chooſes to decline the deciſion of the law by a general verdict; the right of declining which legal determination, is by-the-by a privilege conferred on them by the ſtatute of Weſtminſter, 2d, and by no means a reſtriction of their powers.

But another very important view of the ſubject remains behind: for ſuppoſing I had failed in eſtabliſhing that contraſt between criminal and civil caſes, which is now too clear not only

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to require, but even to juſtify another obſervation, the argument would loſe nothing by the failure; the ſimilarity between criminal and civil caſes derives all its application to the argument from the learned judge's ſuppoſition, that the juriſdiction of the jury over the law was never contended for in the latter, and conſequently on a principle of equality could not be ſupported in the former; whereas, I do contend for it, and can inconteſtibly eſtabliſh it in both. This application of the argument is plain from the words of the charge: "If the jury could find the law, it would "undoubtedly hold in civil caſes as well as cri-"minal: but was it ever ſuppoſed that a jury "was competent to ſay the operation of a fine, "or a recovery, or a warranty, which are mere "queſtions of law?"

To this queſtion I anſwer, that the competency of the jury in ſuch caſes is contended for to the full extent of my principle, both by Lyttleton and by Coke: they cannot indeed decide upon them, *de plano*, which, as Vaughan truly ſays, is unintelligible, becauſe an unmixed queſtion of law can by no poſſibility come before them for deciſion; but whenever (which very often happens) the operation of a fine, a recovery, a warranty, or any other record or conveyance known to the law of England comes forward, mixed with the fact on the general iſſue, the jury have then moſt unqueſtionably a right to determine it; and what is more, no other autho-

rity poſſibly can; becauſe when the general iſſue is permitted by law, theſe queſtions cannot appear on the record for the judgment of the court, and although it can grant a new trial, yet the ſame queſtion muſt ultimately be determined by another jury. This is not only ſelf-evident to every lawyer, but, as I ſaid, is expreſsly laid down by Lyttleton in the 368th ſection. "Alſo in ſuch "caſe where the inqueſt may give their verdict "at large, if they will take upon them the "knowledge of the law upon the mat-"ter, they may give their verdict generally "as it is put in their charge: as in the caſe "aforeſaid they may well ſay, that the leſſor did "not diſſeiſe the leſſee if they will." Coke, in his commentary on this ſection, confirms Lyttleton, ſaying, That in doubtful caſes they ſhould find ſpecially for fear of an attaint; and it is plain that the ſtatute of Weſtminſter the 2d, was made either to give or to confirm the right of the jury to find the matter ſpecially if they would, leaving their juriſdiction over the law as it ſtood by the common law. The words of the ſtatute of Weſtminſter 2d, chapter 30th, are, "Ordinatum eſt quod juſticiarii ad aſſizas capi-"endias aſſignati, non compellant juratores dicere "preciſe ſi ſit deſſina vel non; dummodo dicere "voluerint veritatem facti et petere auxilium "curiæ."

From theſe words it ſhould appear, that the juriſdiction of the jury over the law when it came before

before them on the general iſſue, was ſo veſted in them by the conſtitution, that the exerciſe of it in all caſes had been conſidered to be compulſory upon them, and that this act was a legiſlative relief from that compulſion in the caſe of an aſſize of diſſeizin: it is equally plain from the remaining words of the act, that their juriſdiction remained as before; "ſed ſi ſponte velent diciere "quod diſſeiſina eſt vel non, admittatur eorum "veredictum ſub ſuo periculo."

But the moſt material obſervation upon this ſtatute as applicable to the preſent ſubject is, That the terror of the attaint from which it was paſſed to relieve them, having (as has been ſhewn) no exiſtence in caſes of crime, the act only extended to relieve the jury at their diſcretion from finding the law in civil actions; and conſequently it is only from cuſtom, and not from poſitive law, that they are not *even compellible* to give a general verdict involving a judgment of law on every criminal trial.

Theſe principles and authorities certainly eſtabliſh that it is the duty of the judge on every trial where the general iſſue is pleaded, to give to the jury his opinion on the law as applied to the caſe before them; and that they muſt find a general verdict comprehending a judgment of law, unleſs they chooſe to refer it ſpecially to the court.

But we are here, in a caſe where it is contended, that the duty of the judge is the direct contrary of this: that he is to give no opinion at all to the jury upon the law as applied to the caſe before them; that they likewiſe are to refrain from all conſideration of it, and yet that the very ſame general verdict comprehending both fact and law, is to be given by them as if the whole legal matter had been ſummed up by the one and found by the other.

I confeſs I have no organs to comprehend the principle on which ſuch a practice proceeds. I contended for nothing more at the trial than the very practice recommended by Forſter and Lord Raymond: I addreſſed myſelf to the jury upon the law with all poſſible reſpect and deference, and indeed with very marked perſonal attention to the learned judge: ſo far from urging the jury dogmatically to think for themſelves without his conſtitutional aſſiſtance, I called for his opinion on the queſtion of libel, ſaying, That if he ſhould tell them diſtinctly the paper indicted was libellous, though I ſhould not admit that they were bound at all events to give effect to it if they felt it to be innocent; yet I was ready to agree that they ought not to go againſt the charge without great conſideration: but that if he ſhould ſhut himſelf up in ſilence, giving no opinion at all upon the criminality of the paper from which alone any guilt could be faſtened on the publiſher, and ſhould narrow their con-

conſideration to the publication, I entered my proteſt againſt their finding a verdict affixing the epithet of *guilty* to the mere fact of publiſhing a paper, the guilt of which they had not inveſtigated.

If, after this addreſs to the jury, the learned judge had told them, that in his opinion the paper was a libel, but ſtill leaving it to their judgments, and leaving likewiſe the defendant's evidence to their conſideration, had further told them, that he thought it did not exculpate the publication; and if, in conſequence of ſuch directions, the jury had found a verdict for the crown, I ſhould never have made my preſent motion for a new trial: becauſe I ſhould have conſidered ſuch a verdict of guilty as founded upon the opinion of the jury on the whole matter as left to their conſideration, and muſt have ſought my remedy by arreſt of judgment on the record.

But the learned judge took a direct contrary courſe: he gave no opinion at all on the guilt or innocence of the paper; he took no notice of the defendant's evidence of intention; told the jury, in the moſt explicit terms, that neither the one nor the other were within their juriſdiction; and upon the mere fact of publication directed a general verdict comprehending the epithet of guilty, after having expreſsly withdrawn from the jury every conſideration of the merits of the

paper publiſhed, or the intention of the publiſher, from which it is admitted on all hands the guilt of publication could alone have any exiſtence.

My motion is therefore founded upon this obvious and ſimple principle; that the defendant has had in fact no trial; having been found guilty without any inveſtigation of his guilt, and without any power left to the jury to take cognizance of his innocence. I undertake to ſhew, that the jury could not poſſibly conceive or believe from the judge's charge, that they had any juriſdiction to acquit him, however they might have been impreſſed even with the merit of the publication, or convinced of his meritorious intention in publiſhing it: nay, what is worſe, while the learned judge totally deprived them of their whole juriſdiction over the queſtion of libel and the defendant's ſeditious intention, he at the ſame time directed a general verdict of guilty, which comprehended a judgment upon both.

When I put this conſtruction on the learned judge's direction, I found myſelf wholly on the language in which it was communicated; and it will be no anſwer to ſuch conſtruction, that no ſuch reſtraint was meant to be conveyed by it. If the learned judge's intentions were even the direct contrary of his expreſſions, yet if in conſequence of that which was expreſſed though not

not intended, the jury were abridged of a juriſdiction which belonged to them by law, and in the exerciſe of which the defendant had an intereſt, he is equally a ſufferer, and the verdict given under ſuch miſconception of authority is equally void: my application ought therefore to ſtand or fall by the charge itſelf, upon which I diſclaim all diſingenuous cavilling. I am certainly bound to ſhew, that from the general reſult of it, fairly and liberally interpreted, the jury could not conceive that they had any right to extend their conſideration beyond the bare fact of publication, ſo as to acquit the defendant by a judgment founded on the legality of the dialogue, or the honeſty of the intention in publiſhing it,

In order to underſtand the learned judge's direction, it muſt be recollected that it was addreſſed to them in anſwer to me, who had contended for nothing more than that theſe two conſiderations ought to rule the verdict; and it will be ſeen, that the charge, on the contrary, not only excluded both of them by general inference, but by expreſſions, arguments, and illuſtrations the moſt ſtudiouſly ſelected to convey that excluſion, and to render it binding on the conſciences of the jury.

After telling them in the very beginning of his charge, that the ſingle queſtion for their deciſion was, Whether the defendant had pub-

liſhed the pamphlet? he declared to them, that it was not even *allowed* to him, as the judge trying the cauſe, to ſay whether it was or was not a libel: for that if he ſhould ſay it was no libel, and they following his direction ſhould acquit the defendant; they would thereby deprive the proſecutor of his writ of error upon the record, which was one of his deareſt birthrights. The law, he ſaid, was equal between the proſecutor and the defendant; that a verdict of acquittal would cloſe the matter for ever, depriving him of his appeal; and that whatever therefore was upon the record *was not for their deciſion*, but might be carried at the pleaſure of either party to the Houſe of Lords.

Surely language could not convey a limitation upon the right of the jury over the queſtion of libel, or the intention of the publiſher, more poſitive or more univerſal. It was poſitive, inaſmuch as it held out to them that ſuch a juriſdiction could not be entertained without injuſtice; and it was univerſal becauſe the principle had no ſpecial application to the particular circumſtances of that trial; but ſubjected every defendant upon every proſecution for a libel, to an inevitable conviction on the mere proof of publiſhing *any thing*, though both judge and jury might be convinced that the thing publiſhed was innocent and even meritorious.

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My Lord, I make this commentary without the hazard of contradiction from any man whoſe reaſon is not diſordered. For if the proſecutor in every caſe has a birthright by law to have the queſtion of libel left open upon the record, which it can only be by a verdict of conviction on the ſingle fact of publiſhing; no legal right can at the ſame time exiſt in the jury to ſhut out that queſtion by a verdict of acquittal founded upon the merits of the publication, or the innocent mind of the publiſher.

Rights that are repugnant and contradictory cannot be co-exiſtent. The jury can never have a conſtitutional right to do an act beneficial to the defendant, which when done deprives the proſecutor of a right which the ſame conſtitution has veſted in him. No right can belong to one perſon, the exerciſe of which in every inſtance muſt neceſſarily work a wrong to another. If the proſecutor of a libel has in every inſtance the privilege to try the merits of his proſecution before the judges, the jury can have no right in any inſtance to preclude his appeal to them by a general verdict for the defendant.

The jury therefore from this part of the charge muſt neceſſarily have felt themſelves abſolutely limited (I might ſay even in their powers) to the fact of publication; becauſe the higheſt reſtraint upon good men is to convince them that they cannot break looſe from it without injuſtice:

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and the power of a good citizen is never more effectually deſtroyed than when he is made to believe that the exerciſe of it will be a breach of his duty to the public, and a violation of the laws of his country.

But ſince equal juſtice between the proſecutor and the defendant is the pretence for this abridgment of juriſdiction, let us examine a little how it is effected by it.

Do the proſecutor and the defendant really ſtand upon an equal footing by this mode of proceeding? with what decency this can be alledged, I leave thoſe to anſwer who know that it is only by the indulgence of Mr. Bearcroft, of counſel for the proſecution, that my reverend client is not at this moment in priſon *, while we are diſcuſſing this notable equality.

Beſides, my Lord, the judgment of this court, though not final in the conſtitution, and therefore not binding on the proſecutor, is abſolutely concluſive on the defendant. If your Lordſhips pronounce the record to contain no libel, and arreſt the judgment on the verdict, the proſecutor may carry it to the Houſe of Lords; and pending his

* Lord Mansfield ordered the Dean to be committed on the motion for the new trial, and ſaid, he had no diſcretion to ſuffer him to be at large, without conſent, after his appearance in court, on conviction. Upon which, Mr. Bearcroft gave his conſent that the Dean ſhould remain at large upon bail.

writ

writ of error remains untouched by your Lordſhip's deciſion. But, if judgment be againſt the defendant, it is only at the diſcretion of the crown (as it is ſaid) and not of right, that he can proſecute any writ of error at all; and even if he finds no obſtruction in that quarter, it is but at the beſt an appeal for the benefit of public liberty, from which he himſelf can have no perſonal benefit; for the writ of error being no ſuperſedeas, the puniſhment is inflicted on him in the mean time.

In the caſe of Mr. Horne, this court impriſoned him for publiſhing a libel upon its own judgment, pending his appeal from its juſtice; and he had ſuffered the utmoſt rigour which the law impoſed upon him as a criminal, at the time that the Houſe of Lords, with the aſſiſtance of the twelve judges of England, were gravely aſſembled to determine, whether he had been guilty of any crime. I do not mention this caſe as hard or rigorous on Mr. Horne, as an individual: it is the general courſe of practice, but ſurely that practice ought to put an end to this argument of equality between proſecutor and priſoner.

It is adding inſult to injury, to tell an innocent man who is in a dungeon pending his writ of error, and of whoſe innocence, both judge and jury were convinced at the trial; that he is in equal ſcales with his proſecutor, who is at large, becauſe

becauſe he has an opportunity of deciding after the expiration of his puniſhment, that the proſecution had been unfounded, and his ſufferings unjuſt.

By parity of reaſoning, a priſoner in a capital caſe is to be hanged in the mean time for the benefit of equal juſtice; leaving his executors to fight the battle out with his proſecutor upon the record, through every court in the kingdom: by which at laſt his attainder muſt be reverſed, and the blood of his poſterity remain uncorrupted. What juſtice can be more impartial or equal!

So much for this right of the proſecutor of a libel to *compel* a jury in every caſe, generally to convict a defendant on the fact of publication, or to find a ſpecial verdict. A right unheard of before ſince the birth of the conſtitution; not even founded upon any equality in fact, even if ſuch a ſhocking parity could exiſt in law, and not even contended to exiſt in any other caſe where private men become the proſecutors of crimes for the ends of public juſtice.

It can have, generally ſpeaking, no exiſtence in any proſecution for felony; becauſe the general deſcription of the crime in ſuch indictments, for the moſt part, ſhuts out the legal queſtion in the particular inſtance, from appearing on the record: and for the ſame reaſon, it can have no place even in appeals of death, &c. the only

caſes

caſes where proſecutors appear as the revengers of their own private wrongs, and not as the repreſentatives of the crown.

The learned judge proceeded next to eſtabliſh the ſame univerſal limitation upon the power of the Jury, from the hiſtory of different trials, and the practice of former judges who preſided at them. And while I am complaining of what I conceive to be injuſtice, I muſt take care not to be unjuſt myſelf. I certainly do not, nor ever did conſider the learned judge's miſdirection in his charge to be peculiar to himſelf: it was only the reſiſtance of the defendant's evidence, and what paſſed after the jury returned into court with the verdict, that I ever conſidered to be a departure from all precedents: the reſt had undoubtedly the ſanction of ſeveral modern caſes; and I wiſh, therefore, to be diſtinctly underſtood, that I partly found my motion for a new trial in oppoſition to theſe deciſions. It is my duty to ſpeak with deference of all the judgments of this court; and I feel an additional reſpect for ſome of thoſe I am about to combat, becauſe they are your Lordſhip's: but comparing them with the judgments of your predeceſſors for ages, which is the higheſt evidence of Engliſh law, I muſt be forgiven if I preſume to queſtion their authority.

My Lord, it is neceſſary that I ſhould take notice of ſome of them as they occur in the learned judge's

judge's charge; for although he is not reſponſible for the rectitude of thoſe precedents which he only cited in ſupport of it, yet the defendant is unqueſtionably entitled to a new trial, if their principles are not ratified by the court: for whenever the learned judge cited precedents to warrant the limitation on the province of the jury impoſed by his own authority, it was ſuch an adoption of the doctrines they contained, as made them a rule to the jury in their deciſion.

Firſt then, the learned judge, to overturn my argument with the jury for their juriſdiction over the whole charge, oppoſed your Lordſhip's eſtabliſhed practice for eight and twenty years; and the weight of this great authority was encreaſed by the general manner in which it was ſtated; for I find no expreſſions of your Lordſhip's in any of the reported caſes which go the length contended for. I find the practice, indeed, fully warranted by them; but I do not meet with the principle which can alone vindicate that practice, fairly and diſtinctly avowed. The learned judge, therefore, referred to the charge of chief juſtice Raymond, in the caſe of the King and Franklin, in which the univerſal limitation contended for, is indeed laid down, not only in the moſt unequivocal expreſſions, but the ancient juriſdiction of juries, reſting upon all the authorities I have cited, treated as a ridiculous notion which had been juſt taken up a little before the year 1731; and which no

no man living had ever dreamt of before. The learned judge obſerved, that Lord Raymond ſtated to the jury on Franklin's trial, that there were three queſtions: the firſt was, the fact of publiſhing the Craftſman. Secondly, whether the averments in the information were true: but that the third, viz. whether it was a libel, was merely a queſtion of *law* with which the jury *had nothing to do*, as had been then of late thought by ſome people who ought to have known better.

This direction of Lord Raymond's was fully ratified and adopted in all its extent, and given to the jury, on the preſent trial, with ſeveral others of the ſame import, as an unerring guide for their conduct; and ſurely human ingenuity could not frame a more abſtract and univerſal limitation upon their right to acquit the defendant by a general verdict; for Lord Raymond's expreſſions amount to an abſolute denial of the right of the jury to find the defendant not guilty, if the publication and innuendos are proved. "Libel or no "libel, is a queſtion of law with which you, the "jury, *have nothing to do.*" How then can they have any right to give a general verdict conſiſtently with this declaration? can any man in his ſenſes collect that he has a right to decide on that with which he has nothing to do?

But it is needleſs to comment on theſe expreſſions, for the jury were likewiſe told by the learned judge

judge himſelf, that if they believed the fact of publication, they were *bound* to find the defendant guilty; and it will hardly be contended, that a man has a right to refrain from doing that which he is bound to do.

Mr. Cowper, as counſel for the proſecution, took upon him to explain what was meant by this expreſſion; and I ſeek for no other conſtruction: "The learned judge (ſaid he) did not mean to "deny the right of the jury, but only to convey, "that there was a religious and moral obligation "upon them to refrain from the exerciſe of it."

Now, if the principle which impoſed that obligation had been alledged to be ſpecial, applying only to the particular caſe of the Dean of St. Aſaph, and conſequently conſiſtent with the right of the jury, to a more enlarged juriſdiction in other inſtances: telling the jury that they were bound to convict on proof of publication, might be plauſibly conſtrued into a recommendation to refrain from the exerciſe of their right in that caſe, and not to a general denial of its exiſtence: but the moment it is recollected, that the principle which bound them was not particular to the inſtance, but abſtract, and univerſal, binding alike in every proſecution for a libel, it requires no logic to pronounce the expreſſion to be an abſolute, unequivocal, and univerſal denial of the right: common ſenſe tells every man, that to ſpeak of a perſon's

right

right to do a thing which yet in every poſſible inſtance where it might be exerted, he is religiouſly and morally bound not to exert, is not even ſophiſtry, but downright vulgar nonſenſe.

But, my Lord, the jury were not only limited by theſe modern precedents, which certainly have an exiſtence; but were in my mind limited with ſtill greater effect by the learned judge's declaration, that ſome of thoſe antient authorities on which I had principally relied for the eſtabliſhment of their juriſdiction, had not merely been overruled, but were altogether inapplicable. I particularly obſerved how much ground I loſt with the jury, when they were told from the bench, that even in Buſhel's caſe, on which I had ſo greatly depended, the very reverſe of my doctrine had been expreſsly eſtabliſhed: The court having ſaid unanimouſly in that caſe, according to the learned judge's ſtate of it, that if the jury be aſked what the law is, they cannot ſay, and having likewiſe ratified in expreſs terms the maxim, *Ad queſtionem legis non reſpondent juratores.*

My Lord, this declaration from the bench, which I confeſs not a little ſtaggered and ſurprized me, rendered it my duty to look again into Vaughan, where Buſhel's caſe is reported; I have performed that duty, and now take upon me poſitively to ſay, that the words of Lord Chief Juſtice Vaughan, which the learned judge con-

 ſidered

ſidered as a judgment of the court, denying the juriſdiction of the jury over the law, *where a general iſſue is joined before them*, were on the contrary made uſe of by that learned and excellent perſon, to expoſe the fallacy of ſuch a miſapplication of the maxim alluded to, by the counſel againſt Buſhel; declaring that it had no reference to any caſe where the law and the fact were incorporated by the plea of not guilty, and confirming the right of the jury to find the law upon every ſuch iſſue, in terms the moſt emphatical and expreſſive. This is manifeſt from the whole report.

Buſhel, one of the jurors on the trial of Penn and Mead, had been committed by the court for finding the defendant not guilty, againſt the direction of the court in matter of law; and being brought before the court of common pleas by habeas corpus, this cauſe of commitment appeared upon the face of the return to the writ. It was contended by the counſel againſt Buſhel upon the authority of this maxim, that the commitment was legal, ſince it appeared by the return, that Buſhel had taken upon him to find the law againſt the direction of the judge, and had been therefore legally impriſoned for that contempt. It was upon that occaſion that Chief Juſtice Vaughan, with the concurrence of the whole court, repeated the maxim, *Ad queſtionem legis non reſpondent juratores*, as cited by the counſel for the crown, but denied the application of it to impoſe any reſtraint upon jurors trying

trying any crime upon the general iſſue. His language is too remarkable to be forgotten, and too plain to be miſunderſtood. Taking the words of the return to the habeas corpus, viz. "That the "jury did acquit againſt the direction of the court "in matter of law." "Theſe words (ſaid this "great lawyer) taken literally and *de plano* are in- "ſignificant and unintelligible, for no iſſue can be "joined of matter of law, no jury can be charged "with the trial of matter of law barely: no evi- "dence ever was, or can be given to a jury of what "is law or not; nor any oath given to a jury to "try matter of law alone, nor can any attaint lie "for ſuch a falſe oath. Therefore we muſt take "off this veil and colour of words, which make "a ſhew of being ſomething, but are in fact "nothing: for if the meaning of theſe words, "*Finding againſt the direction of the court in matter "of law*, be, that if the judge, having heard the "evidence given in court, (for he knows no other,) "ſhall tell the jury upon this evidence, that the "law is for the plaintiff or the defendant, and they "under the pain of fine and impriſonment are to "find accordingly, every one ſees that the jury is "but a troubleſome delay, great charge, and of "no uſe in determining right and wrong; which "were a ſtrange and new found concluſion, after a "trial ſo celebrated for many hundreds of years in "this country."

Lord Chief Juſtice Vaughan's argument is therefore plainly this. Adverting to the arguments of the counſel, he ſays, you talk of the maxim *Ad queſtionem legis non reſpondent juratores*, but it has no ſort of application to your ſubject. The words of your return, viz. That Buſhel did acquit againſt the direction of the court in matter of law, is unintelligible and as applied to the caſe impoſſible. The jury could not be aſked in the abſtract, what was the law: they could not have an iſſue of the law joined before them: they could not be ſworn to try it. *Ad queſtionem legis non reſpondent juratores:* therefore to ſay literally and *de plano* that the jury found the law againſt the judge's direction is abſurd: they could not be in a ſituation to find it; an unmixed queſtion of law could not be before them: the judge could not give any poſitive directions of law upon the trial, for the law can only ariſe out of facts, and the judge cannot know what the facts are till the jury have given their verdict. Therefore, continued the chief juſtice, let us take off this veil and colour of words, which make a ſhew of being ſomething but are in fact nothing: let us get rid of the fallacy of applying a maxim, which truly deſcribes the juriſdiction of the courts over iſſues of law, to deſtroy the juriſdiction of jurors, in caſes where law and fact are blended together upon a trial. For if the jury at the trial are bound to receive the law from the judge, every one ſees that it is a mere

mockery,

mockery, and of no uſe in determining right and wrong.

This is the plain common ſenſe of the argument; and it is impoſſible to ſuggeſt a diſtinction between its application to Buſhel's caſe and to the preſent; except that the right of impriſoning the jurors was there contended for, in order to enforce obedience to the directions of the judge. But this diſtinction, if it deſerves the name, though held up by Mr. Bearcroft as very important, is a diſtinction without a difference. For if, according to Vaughan, the free agency of the jury over the whole charge, uncontrouled by the judge's direction, conſtitutes the whole of that antient mode of trial; it ſignifies nothing by what means that free agency is deſtroyed: whether by the impriſonment of conſcience or of body; by the operation of their virtues or of their fears: whether they decline exerting their juriſdiction from being told that the exertion of it is a contempt of religious and moral order, or a contempt of the court puniſhable by impriſonment; their juriſdiction is equally taken away.

My Lord, I ſhould be very ſorry improperly to waſte the time of the court, but I cannot help repeating once again, that if in conſequence of the learned judge's directions, the jury from a juſt deference to learning and authority, from a nice and modeſt ſenſe of duty, felt themſelves not at liberty

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to deliver the defendant from the whole indictment; he has not been tried. Becauſe though he was entitled by law to plead generally that he was not guilty; though he did in fact plead it accordingly and went down to trial upon it, yet the jury have not been permitted to try that iſſue, but have been directed to find at all events a general verdict of guilty; with a poſitive injunction not to inveſtigate the guilt, or even to liſten to any evidence of innocence.

My Lord, I cannot help contraſting this trial, with that of Colonel Gordon's but a few ſeſſions paſt in London. I had in my hand but this moment, an accurate note of Mr. Baron Eyre's* charge to the jury on that occaſion; I will not detain the court by looking for it amongſt my papers; becauſe I believe I can correctly repeat the ſubſtance of it.

Earl of Mansfield. The caſe of the King againſt Coſmo Gordon.

Mr. Erſkine. Yes, my Lord; Colonel Gordon was indicted for the murder of General Thomas, whom he had killed in a duel: and the queſtion was, whether if the jury were ſatisfied of that fact, the priſoner was to be convicted of murder?

That was according to Forſter as much a queſtion of law, as libel or no libel: but Mr. Baron

* Now Lord Chief Baron.

Eyre

Eyre did not therefore feel himſelf at liberty to withdraw it from the jury. After ſtating (greatly to his honour) the hard condition of the priſoner, who was brought to a trial for life, in a caſe where the poſitive law and the prevailing manners of the times were ſo ſtrongly in oppoſition to one another, that he was afraid the puniſhment of individuals would never be able to beat down an offence ſo ſanctioned; he addreſſed the jury nearly in theſe words: "Nevertheleſs, gentlemen, I am "bound to declare to you, what the law is as ap- "plied to this caſe, in all the different views in "which it can be conſidered by you upon the evi- "dence. *Of this law and of the facts as you ſhall "find them, your verdict muſt be compounded*, and I "perſuade myſelf, that it will be ſuch a one as to "give ſatisfaction to your own conſciences."

Now, if Mr. Baron Eyre, inſtead of telling the jury that a duel, however fairly and honourably fought, was a murder by the law of England, and leaving them to find a general verdict under that direction, had ſaid to them, that whether ſuch a duel was murder or manſlaughter, was a queſtion with which neither he nor they had any thing to do, and on which he ſhould therefore deliver no opinion; and had directed them to find that the priſoner was guilty of killing the deceaſed in a deliberate duel, telling them, that the court would ſettle the reſt; that would have been directly conſonant to the caſe of the Dean of St. Aſaph. By

this direction, the priſoner would have been in the hands of the court, and the judges, not the jury, would have decided upon the life of Colonel Gordon.

But the two learned judges differ moſt eſſentially indeed.

Mr. Baron Eyre conceives himſelf bound in duty to ſtate the law as applied to the particular facts, and to leave it to the jury.

Mr. Juſtice Buller ſays, he is not bound nor even allowed ſo to ſtate or apply it, and withdraws it entirely from their conſideration.

Mr. Baron Eyre tells the jury that their verdict is to be compounded of the fact and the law.

Mr. Juſtice Buller on the contrary, that it is to be confined to the fact only, the law being the excluſive province of the court.

My Lord, it is not for me to ſettle differences of opinion between the judges of England, nor to pronounce which of them is wrong: but, ſince they are contradictory and inconſiſtent, I may hazard the aſſertion that they cannot both be right: the authorities which I have cited, and the general ſenſe of mankind which ſettles every thing elſe, muſt determine the reſt.

My

My Lord, I come now to a very important part of the caſe, untouched I believe before in any of the arguments on this occaſion.

I mean to contend, that the learned judge's charge to the jury cannot be ſupported even upon its own principles; for, ſuppoſing the court to be of opinion that all I have ſaid in oppoſition to theſe principles is inconcluſive, and that the queſtion of libel, and the intention of the publiſher were properly withdrawn from the conſideration of the jury, ſtill I think I can make it appear that ſuch a judgment would only render the miſdirection more palpable and ſtriking.

I may ſafely aſſume, that the learned judge muſt have meant to direct the jury either to find a general or a ſpecial verdict; or to ſpeak more generally, that one of theſe two verdicts muſt be the object of every charge: For I venture to affirm, that neither the records of the courts, the reports of their proceedings, nor the writings of lawyers, furniſh any account of a third. There can be no middle verdict between both; the jury muſt either try the whole iſſue generally, or find the facts ſpecially, referring the legal concluſion to the court.

I may affirm with equal certainty, that the general verdict, *ex vi termini*, is univerſally as comprehenſive as the iſſue, and that conſequently ſuch a verdict

a verdict on an indictment, upon the general iſſue, not guilty, univerſally and unavoidably involves a judgment of law, as well as fact; becauſe the charge comprehends both, and the verdict, as has been ſaid, is coextenſive with it. Both Coke and Littleton, give this preciſe definition of a general verdict; for they both ſay, that if the jury will find the law, they may do it by a general verdict, which is ever as large as the iſſue. If this be ſo, it follows by neceſſary conſequence, that if the judge means to direct the jury to find generally againſt a defendant, he muſt leave to their conſideration every thing which goes to the conſtitution of ſuch a general verdict, and is therefore bound to permit them to come to, and to direct them how to form that general concluſion from the law and the fact, which is involved in the term guilty. For it is ridiculous to ſay, that guilty is a fact, it is a concluſion in law from a fact, and therefore can have no place in a ſpecial verdict, where the legal concluſion is left to the court.

In this caſe the defendant is charged, not with having publiſhed this pamphlet, but with having publiſhed a certain falſe, ſcandalous, and ſeditious libel, with a ſeditious and rebellious intention. He pleads that he is not guilty in manner and form as he is accuſed; which plea is admitted on all hands to be a denial of the whole charge, and conſequently does not merely put in iſſue the fact of publiſhing the pamphlet; but the truth of the whole indict-

ment,

ment, *i. e.* the publication of the libel ſet forth in it, with the intention charged by it.

When this iſſue comes down for trial, the jury muſt either find the whole charge or a part of it; and admitting for argument ſake, that the judge has a right to dictate either of theſe two courſes; he is undoubtedly bound in law to make his direction to the jury conformable to the one or the other. If he means to confine the jury to the fact of publiſhing, conſidering the guilt of the defendant to be a legal concluſion for the court to draw from that fact, ſpecially found on the record: he ought to direct the jury to find that fact without affixing the epithet of guilty to the finding. But, if he will have a general verdict of guilty, which involves a judgment of law as well as fact; he muſt leave the law to the conſideration of the jury. For when the word guilty is pronounced by them, it is ſo well underſtood to comprehend every thing charged by the indictment, that the aſſociate or his clerk inſtantly records, that the defendant is guilty in manner and form as he is accuſed, *i. e.* not ſimply that he has publiſhed the pamphlet contained in the indictment; but that he is guilty of publiſhing *the libel* with the wicked intentions charged on him by the record.

Now, if this effect of a general verdict of guilty is reflected on for a moment, the miſdirection of directing one upon the bare fact of publiſhing, will appear

appear in the moſt glaring colours. The learned judge ſays to the jury, Whether this be a libel is not for your conſideration; I can give no opinion on that ſubject without injuſtice to the proſecutor; and as to what Mr. Jones ſwore concerning the defendant's motives for the publication, that is likewiſe not before you: for, if you are ſatisfied in point of fact that the defendant publiſhed this pamphlet, you are bound to find him *guilty*. Why guilty, my lord, when the conſideration of guilt is withdrawn? He confines the jury to the finding of a fact, and enjoins them to leave the legal concluſion from it to the court; yet, inſtead of directing them to make that fact the ſubject of a ſpecial verdict, he deſires them in the ſame breath to find a general one: to draw the concluſion without any attention to the premiſes: to pronounce a verdict which upon the face of the record includes a judgment upon their oaths that the paper is a libel, and that the publiſher's intentions in publiſhing it were wicked and ſeditious, although neither the one nor the other made any part of their conſideration.

My Lord, ſuch a verdict is a monſter in law, without precedent in former times, or root in the conſtitution. If it be true, on the principle of the charge itſelf, that the fact of publication was all that the jury were to find, and all that was neceſſary to eſtabliſh the defendant's guilt, if the thing publiſhed be a libel; Why was not that fact found

found like all other facts upon ſpecial verdicts? Why was an epithet, which is a legal concluſion from the fact, extorted from a jury who were reſtrained from forming it themſelves? The verdict muſt be taken to be general or ſpecial: if general, it has found the whole iſſue without a co-extenſive examination. If ſpecial, the word guilty which is a concluſion from facts can have no place in it.

Either this word guilty is operative or uneſſential; an epithet of ſubſtance, or of form. It is impoſſible to controvert that propoſition, and I give the gentlemen their choice of the alternative. If they admit it to be operative and of real ſubſtance, or, to ſpeak more plainly, that the fact of publication found ſpecially, without the epithet of guilty, would have been an imperfect verdict inconcluſive of the defendant's guilt, and on which no judgment could have followed: then it is impoſſible to deny that the defendant has ſuffered injuſtice; becauſe ſuch an admiſſion confeſſes that a criminal concluſion from a fact has been obtained from the jury, without permitting them to exerciſe that judgment which might have led them to a concluſion of innocence: and that the word guilty has been obtained from them at the trial as a mere matter of form, although the verdict without it, ſtating only the fact of publication which they were directed to find, to which they thought the finding alone enlarged, and beyond which they never enlarged

larged their enquiry, would have been an abſolute verdict of acquittal.

If, on the other hand, to avoid this inſuperable objection to the charge, the word guilty is to be reduced to a mere word of form, and it is to be contended that the fact of publication found ſpecially would have been tantamount; be it ſo: let the verdict be ſo recorded; let the word guilty be expunged from it, and I inſtantly ſit down; I trouble your Lordſhips no further; I withdraw my motion for a new trial, and will maintain in arreſt of judgment, that the Dean is not convicted. But if this is not conceded to me, and the word guilty though argued to be but form, and though as ſuch obtained from the jury, is ſtill preſerved upon the record, and made uſe of againſt the defendant as ſubſtance; it will then become us, (independently of all conſideration as lawyers,) to conſider a little how that argument is to be made conſiſtent with the honour of gentlemen, or that fairneſs of dealing which cannot but have place wherever juſtice is adminiſtered.

But in order to eſtabliſh that the word guilty is a word of eſſential ſubſtance; that the verdict would have been imperfect without it; and that therefore the defendant ſuffers by its inſertion; I undertake to ſhew your Lordſhip, upon every principle and authority of law, that if the fact of publication, which was all that was left to the jury, had been found

found by ſpecial verdict, no judgment could have been given on it.

My Lord, I will try this by taking the fulleſt finding which the facts in evidence could poſſibly have warranted. Suppoſing then, for inſtance, that the jury had found that the defendant publiſhed the paper according to the tenor of the indictment: that it was written of and concerning the King and his Government; and that the innuendos were likewiſe as averred, K meaning the preſent King, and P the preſent parliament of Great Britain: on ſuch a finding, no judgment could have been given by the court, even if the record had contained a compleat charge of a libel. No principle is more unqueſtionable than that to warrant any judgment upon a ſpecial verdict, the court which can preſume nothing that is not viſible on the record, muſt ſee ſufficient matter upon the face of it, which, if taken to be true, is concluſive of the defendant's guilt. They muſt be able to ſay, if this record be true, the defendant cannot be innocent of the crime which it charges on him. But from the facts of ſuch a verdict the court could arrive at no ſuch legitimate concluſion; for it is admitted on all hands, and indeed expreſsly laid down by your Lordſhip in the caſe of the King againſt Woodfall, that publication even of a libel is not *concluſive* evidence of guilt; for that the defendant may give evidence of an innocent publication.

Looking

Looking therefore upon a record containing a good indictment of a libel, and a verdict finding that the defendant publiſhed it; but without the epithet of guilty, the court could not pronounce that he publiſhed it with the malicious intention which is the eſſence of the crime: they could not ſay what might have paſſed at the trial: for any thing that appeared to them he might have given ſuch evidence of innocent motive, neceſſity, or miſtake, as might have amounted to excuſe or juſtification. They would ſay that the facts ſtated upon the verdict would have been fully ſufficient in the abſence of a legal defence to have warranted the judge to have directed, and the jury to have given a general verdict of guilty, comprehending the intention which conſtitutes the crime: but that to warrant the bench which is ignorant of every thing at the trial, to preſume that intention, and thereupon to pronounce judgment on the record, the jury muſt not merely find full evidence of the crime, but ſuch facts as compoſe its legal definition. This wiſe principle is ſupported by authorities which are perfectly familiar.

If, in an action of trover, the plaintiff proves property in himſelf, poſſeſſion in the defendant, and a demand and refuſal of the thing charged to be converted; this evidence unanſwered is full proof of a converſion; and if the defendant could not ſhew to the jury why he had refuſed to deliver the plaintiff's

plaintiff's property on a legal demand of it, the judge would direct them to find him guilty of the converſion. But on the ſame facts found by ſpecial verdict, no judgment could be given by the court: the judges would ſay, If the ſpecial verdict contains the whole of the evidence given at the trial, the jury ſhould have found the defendant guilty; for the converſion was fully proved, but we cannot declare theſe facts to amount to a converſion, for the defendant's intention was a fact which the jury ſhould have found from the evidence, over which we have no juriſdiction.

So in the caſe put by Lord Coke, I believe in his firſt Inſtitute 115. If a modus is found to have exiſted beyond memory till within thirty years before the trial, the court cannot upon ſuch facts found by ſpecial verdict pronounce againſt the modus: but any one of your Lordſhips would certainly tell the jury, that upon ſuch evidence they were warranted in finding againſt it.

In all caſes of preſcription, the univerſal practice of judges is to direct juries by analogy to the ſtatute of limitations to decide againſt incorporeal rights, which for many years have been relinquiſhed; but ſuch modern relinquiſhments, if ſtated upon the record by ſpecial verdict, would in no inſtance warrant a judgment againſt any preſcription. The principle of the difference is obvious and univerſal: the court looking at a record

can preſume nothing; it has nothing to do with reaſonable probabilities, but is to eſtabliſh legal certainties by its judgments. Every crime is like every other complex idea, capable of a legal definition: if all the component parts which go to its formation are put as facts upon the record, the court can pronounce the perpetrator of them a criminal: but if any of them are wanting, it is a chaſm in fact, and cannot be ſupplied. Wherever intention goes to the eſſence of the charge, it muſt be found by the jury; it muſt be either comprehended under the word guilty in the general verdict, or ſpecifically found as a fact by the ſpecial verdict. This was ſolemnly decided by the court in Huggins's caſe, in ſecond Lord Raymond, 1581, which was a ſpecial verdict of murder from the Old Bailey.

It was an indictment againſt John Huggins, and James Barnes, for the murder of Edward Arne. The indictment charged that Barnes made an aſſault upon Edward Arne, being in the cuſtody of the other priſoner Huggins, and detained him for ſix weeks in a room newly built over the common ſewer of the priſon, where he languiſhed and died: the indictment further charged, that Barnes and Huggins well knew that the room was unwholeſome and dangerous: the indictment then charged that the priſoner Huggins of his malice aforethought was preſent, aiding, and abetting Barnes,

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to commit the murder aforesaid. This was the substance of the indictment.

The special verdict found that Huggins was warden of the Fleet by letters patent: that the other prisoner Barnes was servant to Gibbons Huggins, deputy in the care of all the prisoners, and of the deceased a prisoner there. That the prisoner Barnes, on the 7th of September, put the deceased Arne in a room over the common sewer which had been newly built, knowing it to be newly built, and damp, and situated as laid in the indictment: *and that fifteen days before the prisoner's death*, HUGGINS *likewise well knew that the room was new built, damp, and situated as laid. They found that fifteen days before the death* of the prisoner, Huggins was present in the room, and saw him there under duress of imprisonment, *but then and there turned away, and Barnes locked the door, and that from that time till his death the deceased remained locked up.*

It was argued before the twelve judges in Serjeants Inn, whether Huggins was guilty of murder. It was agreed that he was not answerable *criminally*, for the act of his deputy, and could not be guilty, unless the criminal intention was brought personally home to himself. And it is remarkable how strongly the judges required the fact of knowledge and malice, to be stated on the face of the verdict,

as oppoſed to *evidence* of intention, and inference from a fact.

The court ſaid, it is chiefly relied on that Huggins was preſent in the room, and ſaw Arne *ſub duritie impriſonamenti, et ſe avertit*; but he might be preſent and not know all the circumſtances; the words are VIDIT *ſub duritie*; but he might *ſee* him under dureſs, and not *know* he was under dureſs: it was anſwered that ſeeing him under dureſs evidently means he knew he was under dureſs; but ſays the court, "*we cannot take things by inference in this manner; his ſeeing is but evidence of his knowledge of theſe things, and therefore the jury, if the fact would have borne it, ſhould have found that Huggins knew he was there without his conſent, which not being done we cannot intend theſe things nor infer them; we muſt judge of facts, and not from the evidence of facts;*" and cited Keylnge, 78; that whether a man be aiding and abetting a murder is matter of fact, and ought to be expreſsly found by a jury.

The application of theſe laſt principles and authorities to the caſe before the court is obvious and ſimple.

The criminal intention is a fact, and muſt be found by the jury: and that finding can only be expreſſed upon the record by the general verdict of guilty

guilty which comprehends it, or by the ſpecial enumeration of ſuch facts as do not merely amount to evidence of, but which completely and concluſively conſtitute the crime. But it has been ſhewn, and is indeed admitted, that the publication of a libel is only *prima facie* evidence of the complex charge in the indictment, and not ſuch a fact as amounts in itſelf when ſpecially ſtated to concluſive guilt; ſince as the judges cannot tell how the criminal inference from the fact of publiſhing a libel, might have been rebutted at the trial; no judgment can follow from a ſpecial finding, that the defendant publiſhed the paper indicted according to the tenor laid in the indictment.

It follows from this, that if the jury had only found the fact of publication, which was all that was left to them, *without affixing the epithet of guilty*, which could be only legally affixed by an inveſtigation not permitted to them; a *venire facias de novo* muſt have been awarded becauſe of the uncertainty of the verdict as to the criminal intention: whereas it will now be argued, that if the court ſhall hold the dialogue to be a libel, the defendant is fully convicted; becauſe the verdict does not merely find that he publiſhed, which is a finding conſiſtent with innocence, but finds him GUILTY of publiſhing, which is a finding of the criminal publication charged by the indictment.

My Lord, how I ſhall be able to defend my innocent client againſt ſuch an argument, I am not

prepared to ſay; I feel all the weight of it; but that feeling ſurely entitles me to greater attention, when I complain of that which ſubjects him to it, without the warrant of the law. It is the weight of ſuch an argument that entitles me to a new trial; for the Dean of St. Aſaph is not only found guilty, without any inveſtigation of his guilt by the jury, but without that queſtion being even open to your Lordſhips on the record. Upon the record the court can only ſay the dialogue is, or is not a libel; but if it ſhould pronounce it to be one, the criminal intention of the defendant in publiſhing it is taken for granted by the word guilty; although it has not only not been tried, but evidently appears from the verdict itſelf not to have been found by the jury. Their verdict is, "guilty of publiſhing, "but whether a libel or not they do not find." And it is therefore impoſſible to ſay that they can have found a criminal motive in publiſhing a paper, on the criminality of which they have formed no judgment. Printing and publiſhing that which is legal, contains in it no crime; the guilt muſt ariſe from the publication of a libel; and there is therefore a palpable repugnancy on the face of the verdict itſelf, which firſt finds the Dean guilty of publiſhing, and then renders the finding a nullity, by pronouncing ignorance in the jury whether the the thing publiſhed comprehends any guilt.

To conclude this part of the ſubject, the epithet of guilty (as I ſet out with at firſt) muſt either be taken to be ſubſtance, or form. If it be ſubſtance,

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and as ſuch, concluſive of the *criminal* intention of the publiſher, ſhould the thing publiſhed be hereafter adjudged to be a libel; I aſk a new trial, becauſe the defendant's guilt in that reſpect has been found without having been tried: If on the other hand, the word GUILTY is admitted to be but a word of form, then let it be expunged, and I am not hurt by the verdict.

Having now eſtabliſhed, according to my two firſt propoſitions, that the jury upon every general iſſue, joined in a criminal caſe, have a conſtitutional juriſdiction over the whole charge, I am next in ſupport of my third, to contend, that the caſe of a libel forms no legal exception to the general principles which govern the trial of all other crimes, that the argument for the difference, viz. becauſe the whole charge always appears on the record, is falſe in fact, and that even if true, it would form no ſubſtantial difference in law.

As to the firſt, I ſtill maintain that the whole caſe does by no means neceſſarily appear on the record; the crown may indict part of the publication, which may bear a criminal conſtruction when ſeparated from the context, and the context omitted having no place in the indictment, the defendant can neither demur to it, nor arreſt the judgment after a verdict of guilty; becauſe the court is abſolutely circumſcribed by what appears on the record, and the record contains a legal charge of a libel.

I maintain likewiſe, that according to the principles adopted upon this trial, he is equally ſhut out from ſuch defence before the jury; for though he may read the explanatory context in evidence, yet he can derive no advantage from reading it, if they are tied down to find him guilty of publiſhing the matter which is contained in the indictment, however its innocence may be eſtabliſhed by a view of the whole work. The only operation, which looking at the context can have upon a jury is, to convince them that the matter upon the record, however libellous when taken by itſelf, was not intended to convey the meaning which the words indicted import in language, when ſeparated from the general ſcope of the writing: but upon the principle contended for, they could not acquit the defendant upon any ſuch opinion, for that would be to take upon them the prohibited queſtion of libel, which is ſaid to be matter of law for the court.

My learned friend Mr. Bearcroft appealed to his audience with an air of triumph, whether any ſober man could believe, that an Engliſh jury in the caſe I put from Algernon Sidney would convict a defendant of publiſhing the Bible, ſhould the crown indict a member of a verſe which was blaſphemous in itſelf if ſeparated from the context. My Lord, if my friend had attended to me, he would have found that in conſidering ſuch ſuppoſition as an abſurdity, he was only repeating my own words. I never ſuppoſed that a jury would

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act ſo wickedly, or ſo abſurdly, in a caſe where the principle contended for by my friend Mr. Bearcroft, carried ſo palpable a face of injuſtice, as in the inſtance which I ſelected to expoſe it; and which I therefore ſelected to ſhew that there were caſes in which the ſupporters of the doctrine were aſhamed of it, and obliged to deny its operation: for it is impoſſible to deny that if the jury can look at the context in the caſe put by Sidney, and acquit the defendant on the merits of the thing publiſhed; they may do it in caſes which will directly operate againſt the principle he ſeems to ſupport. This will appear from other inſtances, where the injuſtice is equal, but not equally ſtriking.

Suppoſe the crown were to ſelect ſome paſſage from Locke upon Government; as for inſtance; "that there was no difference *between the king and* "*the conſtable when either of them exceeded their* "*authority.*" That aſſertion under certain circumſtances if taken by itſelf without the context, might be highly ſeditious, and the queſtion therefore would be *quo animo* it was written: perhaps the real meaning of the ſentence might not be diſcoverable by the immediate context without a view of the whole chapter, perhaps of the whole book; therefore to do juſtice to the defendant, upon the very principle by which Mr. Bearcroft in anſwering Sidney's caſe can alone acquit the publiſher of his Bible, the jury muſt look into the whole Eſſay

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on Government, and form a judgment of the design of the author, and the meaning of his work.

Lord Mansfield. To be sure they may judge from the whole work.

Mr. Erskine. And what is this, my Lord, but determing the question of libel which is denied to day: for if a jury may acquit the publisher of any part of Mr. Locke on Government, from a judgment arising out of a view of the whole book, though there be no innuendos to be filled up as facts in the indictment; what is it that bound the jury to convict the Dean of St. Asaph, as the publisher of Sir William Jones's dialogue, on the bare fact of publication, without the right of saying that his observations as well as Mr. Locke's, were speculative, abstract, and legal?

Lord Mansfield. They certainly may in all cases go into the whole context.

Mr. Erskine. And why may they go into the context? clearly, my Lord, to enable them to form a correct judgment of the meaning of the part indicted, even though no particular meaning be submitted to them by averments in the indictment, and therefore the very permission to look at the context for such a purpose, (where there are no innuendos to be filled up by them as facts,) is a palpable admission of all I am contending for, viz. the

the right of the jury to judge of the merits of the paper, and the intention of its author.*

But it is ſaid, that though a juryhave a right to decide that a paper criminal as far as it appears on the record, is nevertheleſs legal when explained by the whole work of which it is a part; yet that they ſhall have no right to ſay that the whole work itſelf if it happens to be all indicted, is innocent and legal. This propoſition, my Lord, upon the bare ſtating of it, ſeems too prepoſterous to be ſeriouſly entertained; yet there is no alternative between maintaining it in its full extent, and abandoning the whole argument.

If the defendant is indicted for publiſhing part of the verſe in the pſalms, "There is no God," it is aſſerted that the jury may look at the context, and ſeeing that the whole verſe did not maintain that blaſphemous propoſition, but only that the fool had ſaid ſo in his heart, may acquit the defendant upon a judgment that it is no libel, to impute ſuch imagination to a fool: but if the whole verſe had been indicted, viz. "the fool has ſaid in his heart "there is no God;" the jury on the principle contended for, would be reſtrained from the ſame judgment of its legality, and muſt convict of blaſphemy on the fact of publiſhing, leaving the queſtion of libel untouched on the record.

* This right was fully exerciſed by the Jury who tried and acquitted Mr. Stockdale.

If in the ſame manner, only part of this very dialogue had been indicted inſtead of the whole, it is ſaid even by your Lordſhip, that the jury might have read the context, and then, notwithſtanding the fact of publiſhing, might have collected from the whole, its abſtract and ſpeculative nature, and have acquitted the defendant upon that judgment of it; and yet it is contended that they have no right to form the ſame judgement of it upon the preſent occaſion, although the whole be before them upon the face of the indictment; but are bound to convict the defendant upon the fact of publiſhing, notwithſtanding they ſhould have come to the ſame judgment of its legality which it is admitted they might have come to on trying an indictment for the publication of a part. Really, my Lord, the abſurdities and groſs departures from reaſon, which muſt be hazarded to ſupport this doctrine are endleſs.

The criminality of the paper is ſaid to be a queſtion of law, yet the meaning of it from which alone the legal interpretation can ariſe, is admitted to be a queſtion of fact. If the text be ſo perplexed and dubious as to require innuendos to explain, to point, and to apply obſcure expreſſion or conſtruction, the jury alone as judges of fact, are to interpret and to ſay what ſentiments the author muſt have meant to convey by his writing: yet if the writing be ſo plain and intelligible as to require no averments of its meaning, it then becomes ſo obſcure

ſcure and myſterious as to be a queſtion of law, and beyond the reach of the very ſame men who but a moment before were interpreters for the judges; and though its object be moſt obviouſly peaceable and its author innocent, they are bound to ſay upon their oaths, that it is wicked and ſeditious and the publiſher of it guilty.

As a queſtion of fact the jury are to try the real ſenſe and conſtruction of the words indicted, by comparing them with the context; and yet if that context itſelf which affords the compariſon makes part of the indictment, the whole becomes a queſtion of law; and they are then bound down to convict the defendant on the fact of publiſhing it, without any juriſdiction over the meaning. To complete the juggle, the intention of the publiſher may likewiſe be ſhewn as a fact, by the evidence of any extrinſic circumſtances, ſuch as the context to explain the writing, or the circumſtances of miſtake or ignorance under which it was publiſhed; and yet in the ſame breath, the intention is pronounced to be an inference of law from the act of publication, which the jury cannot exclude, but which muſt depend upon the future judgment of the court.

But the danger of this ſyſtem, is no leſs obvious than its abſurdity. I do not believe that its authors ever thought of inflicting death upon Engliſhmen, without the interpoſition of a jury; yet its eſtabliſhment

liſhment would unqueſtionably extend to annihilate the ſubſtance of that trial in every proſecution for high treaſon, where the publication of any writing was laid as the overt act. I illuſtrated this by a caſe when I moved for a rule, and called upon my friends for an anſwer to it, but no notice has been taken of it by any of them; this was juſt what I expected: when a convincing anſwer cannot be found to an objection, thoſe who underſtand controverſy never give ſtrength to it by a weak one.

I ſaid, and I again repeat, that if an indictment charges that a defendant did traiterouſly intend, compaſs, and imagine the death of the king; and in order to carry ſuch treaſon into execution, publiſhed a paper which it ſets out literatim on the face of the record, the principle which is laid down to day would ſubject that perſon to the pains of death by the ſingle authority of the judges, without leaving any thing to the jury, but the bare fact of publiſhing the paper. For, if that fact were proved, and the defendant called no witneſſes, the judge who tried him would be warranted, nay bound in duty by the principle in queſtion, to ſay to the jury, Gentlemen, the overt act of treaſon charged upon the defendant, is the publication of this paper, intending to compaſs the death of the King; the fact is proved, and you are therefore bound to convict him: the treaſonable intention is an inference of law from the act of publiſhing; and if the

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thing publiſhed does not upon a future examination intrinſically ſupport that inference, the court will arreſt the judgment, and your verdict will not affect the priſoner.

My Lord, I will reſt my whole argument upon the analogy between theſe two caſes, and give up every objection to the doctrine when applied to the one, if upon the ſtricteſt examination it ſhall not be found to apply equally to the other.

If the ſeditious intention be an inference of law, from the fact of publiſhing the paper which this indictment charges to be a libel, is not the treaſonable intention equally an inference from the fact of publiſhing that paper, which the other indictment charges to be an overt act of treaſon? In the one caſe as in the other, the writing or publication of a paper is the whole charge; and the ſubſtance of the paper ſo written or publiſhed makes all the difference between the two offences. If that ſubſtance be matter of law where it is a ſeditious libel, it muſt be matter of law where it is an act of treaſon: and if becauſe it is law the jury are excluded from judging it in the one inſtance, their judgment muſt ſuffer an equal abridgment in the other.

The conſequence is obvious. If the jury by an appeal to their conſciences are to be thus limited in the free exerciſe of that right which was given them

them by the conſtitution, to be a protection againſt judicial authority where the weight and majeſty of the crown is put into the ſcale againſt an obſcure individual, the freedom of the preſs is at an end: for how can it be ſaid that the preſs is free becauſe every thing may be publiſhed without a previous licence, if the publiſher of the moſt meritorious work which the united powers of genius and patriotiſm ever gave to the world, may be proſecuted by information of the King's attorney general, without the conſent of the grand jury, may be convicted by the petty jury, on the mere fact of publiſhing, (who indeed without perjuring themſelves muſt on this ſyſtem inevitably convict him), and muſt then depend upon judges who may be the ſupporters of the very adminiſtration whoſe meaſures are queſtioned by the defendant, and who muſt therefore either give judgment againſt him or againſt themſelves.

To all this Mr. Bearcroft ſhortly anſwers, Are you not in the hands of the ſame judges, with reſpect to your property and even to your life, when ſpecial verdicts are found in murder, felony, and treaſon? in theſe caſes do priſoners run any hazard from the application of the law by the judges, to the facts found by the juries? Where can you poſſibly be ſafer?

My Lord, this is an argument which I can anſwer without indelicacy or offence, becauſe your Lordſhip's

ſhip's mind is much too liberal to ſuppoſe, that I inſult the court by general obſervations on the principles of our legal government: however ſafe we might be or might think ourſelves, the conſtitution never intended to inveſt judges with a diſcretion, which cannot be tried and meaſured by the plain and palpable ſtandard of law; and in all the caſes put by Mr. Bearcroft, no ſuch looſe diſcretion is exerciſed as muſt be entertained by a judgment on a ſeditious libel, and therefore the caſes are not parrallel.

On a ſpecial verdict for murder, the life of the priſoner does not depend upon the religious, moral, or philoſophical ideas of the judges, concerning the nature of homicide: no, precedents are ſearched for, and if he is condemned at all, he is judged exactly by the ſame rule as others have been judged by before him; his conduct is brought to a preciſe, clear, intelligible ſtandard, and cautiouſly meaſured by it: it is the law therefore and not the judge which condemns him. It is the ſame in all indictments, or civil actions for ſlander upon individuals.

Reputation is a perſonal right of the ſubject, indeed the moſt valuable of any, and it is therefore ſecured by law, and all injuries to it clearly aſcertained: whatever ſlander hurts a man in his trade, ſubjects him to danger of life, liberty, or loſs of property, or tends to render him infamous,

is the ſubject of an action, and in ſome inſtances of an indictment. But in all theſe caſes where the *malus animus* is found by the jury, the judges are in like manner a ſafe repoſitory of the legal conſequence; becauſe ſuch libels may be brought to a well known ſtandard of ſtrict and poſitive law; they leave no diſcretion in the judges: the determination of what words when written or ſpoken of another are actionable, or the ſubject of an indictment, leaves no more latitude to a court ſitting in judgment on the record, than a queſtion of title does in a ſpecial verdict in ejectment.

But I beſeech your Lordſhip, to conſider by what rule the legality or illegality of this dialogue is to be decided by the court as a queſtion of law upon the record. Mr. Bearcroft has admitted in the moſt unequivocal terms, (what indeed it was impoſſible for him to deny,) that every part of it when viewed in the abſtract was legal; but he ſays, there is a great diſtinction to be taken between ſpeculation and exhortation, and that it is this latter which makes it a libel. I readily accede to the truth of the obſervation, but how your Lordſhip is to determine that difference as a queſtion of law, is paſt my comprehenſion: for if the dialogue in its phraſe and compoſition be general, and its libellous tendency ariſes from the purpoſe of the writer, to raiſe diſcontent by a ſeditious application of legal doctrines; that purpoſe is ſurely a queſtion of fact if ever there was one, and muſt therefore be diſtinctly

diſtinctly averred in the indictment, to give the cognizance of it as a fact to the jury, without which no libel can poſſibly appear upon the record: this is well known to be the only office of the innuendo; becauſe the judges can preſume nothing which the ſtricteſt rules of grammar do not warrant them to collect intrinſically from the writing itſelf.

Circumſcribed by the record, your Lordſhip can form no judgment of the tendency of this dialogue to excite ſedition by any thing but the mere words: you muſt look at it as if it was an old manuſcript dug out of the ruins of Herculaneum; you can collect nothing from the time when, or the circumſtances under which it was publiſhed; the perſon by whom, and thoſe amongſt whom it was circulated; yet theſe may render a paper at one time, and under ſome circumſtances, dangerouſly wicked and ſeditious, which at another time, and under different circumſtances, might be innocent and highly meritorious.

If puzzled by a taſk ſo inconſiſtent with the real ſenſe and ſpirit of judicature, your Lordſhips ſhould ſpurn the fetters of the record, and judging with the reaſon rather than the infirmities of men, ſhould take into your conſideration, the ſtate of men's minds on the ſubject of equal repreſentation at this moment, and the great diſpoſition of the preſent times to revolution in government: if reading the record with theſe impreſſions your Lordſhips ſhould

be led to a judgment not warranted by an abſtract conſideration of the record, then beſides that ſuch a judgment would be founded on facts not in evidence before the court, and not within its juriſdiction if they were; let me further remind your Lordſhips, that even if thoſe objections to the premiſes were removed, the concluſion would be no concluſion of law: your deciſion on the ſubject might be very ſagacious as politicians, as moraliſts, as philoſophers, or as licencers of the preſs, but they would have no reſemblance to the judgments of an Engliſh court of juſtice, becauſe it could have no warrant from the acts of your predeceſſors, nor afford any precedent to your ſucceſſors.

But all theſe objections are perfectly removed, when the ſeditious tendency of a paper is conſidered as a queſtion of fact: we are then relieved from the abſurdity of a legal diſcuſſion ſeparated from all the facts from which alone the law can ariſe; for the jury can do what (as I obſerved before) your Lordſhips cannot do in judging by the record; they can examine by evidence all thoſe circumſtances that lead to eſtabliſh the ſeditious tendency of the paper from which the court is ſhut out: they may know themſelves, or it may be proved before them, that it has excited ſedition already: they may collect from witneſſes that it has been widely circulated, and ſeditiouſly underſtood; or, if the proſecution (as is wiſeſt) precedes theſe conſequences, and the reaſoning muſt be a priori, ſurely gentlemen living in the country are much better

better judges than your Lordſhip, what has or has not a tendency to diſturb the neighbourhood in which they live, and that very neighbourhood is the forum of criminal trial.

If they know that the ſubject of the paper is the topic that agitates the country around them; if they ſee danger in that agitation, and have reaſon to think that the publiſher muſt have intended it; they ſay he is guilty. If, on the other hand, they conſider the paper to be legal, and enlightening in principle; likely to promote a ſpirit of activity and liberty in times when the activity of ſuch a ſpirit is eſſential to the public ſafety, and have reaſon to believe it to be written and publiſhed in that ſpirit; they ſay, as they ought to do, that the writer or the publiſher is not guilty. Whereas your Lordſhip's judgment upon the language of the record muſt ever be in the pure abſtract; operating blindly and indiſcriminately upon all times, circumſtances, and intentions, making no diſtinction between the glorious attempts of a Sidney or a Ruſſel, ſtruggling againſt the terrors of deſpotiſm under the Stuarts; and thoſe deſperate adventurers of the year forty-five, who libelled the perſon, and excited rebellion againſt the mild and gracious government of our late excellent ſovereign King George the Second.

My Lord, if the independent gentlemen of England are thus better qualified to decide from cauſe of knowledge, it is no offence to the court

to ſay, that they are full as likely to decide with impartial juſtice as judges appointed by the crown. Your Lordſhips have but a life intereſt in the public property, but they have an inheritance in it for their children. Their landed property depends upon the ſecurity of the government, and no man who wantonly attacks it can hope or expect to eſcape from the ſelfiſh lenity of a jury. On the firſt principles of human action they muſt lean heavily againſt him. It is only when the pride of Engliſhmen is picqued by ſuch doctrines as I am oppoſing to-day, that they think it better to ſcreen the guilty by an indiſcriminate oppoſition to them, than ſurrender thoſe rights by which alone innocence in the day of danger can be protected.

I venture therefore to ſay, in ſupport of one of my original propoſitions, that where a writing indicted as a libel, neither contains, nor is averred by the indictment to contain any ſlander of an individual, ſo as to fall within thoſe rules of law which protect perſonal reputation, but whoſe criminality is charged to conſiſt (as in the preſent inſtance) in its tendency to ſtir up general diſcontent, that the trial of ſuch an indictment neither involves, nor can in its obvious nature involve any abſtract queſtion of law for the judgment of a court, but muſt wholly depend upon the judgment of the jury on the tendency of the writing itſelf, to produce ſuch conſequences, when connected with all the circumſtances which attended its publication.

It is unneceſſary to puſh this part of the argument further, becauſe I have heard nothing from the bar againſt the poſition which it maintains; none of the gentlemen have, to my recollection, given the court any one ſingle reaſon, good or bad, why the *tendency* of a paper to ſtir up diſcontent againſt government, ſeparated from all the circumſtances which are ever ſhut out from the record, ought to be conſidered as an abſtract queſtion of law: they have not told us where we are to find any matter in the books to enable us to argue ſuch queſtions before the court; or where your Lordſhips yourſelves are to find a rule for your judgments on ſuch ſubjects. I confeſs that to me it looks more like legiſlation, or arbitrary power, than Engliſh judicature. If the court can ſay, this is a criminal writing, *not* becauſe we know that miſchief was intended by its author, or is even contained in itſelf, but becauſe fools believing the one and the other may do miſchief in their folly; the ſuppreſſion of ſuch writings under particular circumſtances may be wiſe policy in a ſtate, but upon what principle it can be criminal law in England to be ſettled in the abſtract by judges, I confeſs with humility, that I have no organs to underſtand.

Mr. Leyceſter felt the difficulty of maintaining ſuch a propoſition by any argument of law, and therefore had recourſe to an argument of fact. "If (ſays my learned friend) what is or is not a

" ſeditious libel, be not a queſtion of law for the " court, but of fact for the jury, upon what prin- " ciple do defendants found guilty of ſuch libels " by a general verdict, defeat the judgment for " error on the record: and what is ſtill more in " point, upon what principle does Mr. Erſkine " himſelf, if he fails in his preſent motion, mean " to aſk your Lordſhips to arreſt this very judg- " ment by ſaying that the dialogue is not a libel."

My Lord, the obſervation is very ingenious, and God knows the argument requires that it ſhould; but it is nothing more. The arreſt of judgment which follows after a verdict of guilty for publiſhing a writing, which on inſpection of the record exhibits to the court no ſpecific offence againſt the law, is no impeachment of my doctrine: I never denied ſuch a juriſdiction to the court. My poſition is, that no man ſhall be puniſhed for the criminal breach of any law, until a jury of his equals have pronounced him guilty in mind as well as in act. *Actus non facit reum niſi mens ſit rea.*

But I never aſſerted that a jury had the power to make criminal law as well as to adminiſter it; and therefore it is clear that they cannot deliver over a man to puniſhment if it appears by the record of his accuſation, which is the office of judicature to examine, that he has not offended againſt any poſitive law; becauſe however criminal he may have been in his diſpoſition, which is a fact

eſtabliſhed

eſtabliſhed by the verdict, yet ſtatute and precedents can alone decide what is by law an *indictable* offence.

If, for inſtance, a man were charged by an indictment with having held a diſcourſe in words highly ſeditious, and were found guilty by the jury, it is evident that it is the province of the court to arreſt that judgment; becauſe though the jury have found that he ſpoke the words as laid in the indictment, with the ſeditious intention charged upon him, which they, and they only could find; yet as the words are not puniſhable by indictment, as when committed to writing, the court could not pronounce judgment: the declaration of the jury that the defendant was guilty in manner and form as accuſed, could evidently never warrant a judgment, if the accuſation itſelf contained no charge of an offence againſt the law.

In the ſame manner, if a butcher were indicted for privately putting a ſheep to cauſeleſs and unneceſſary torture in the exerciſe of his trade, but not in public view ſo as to be productive of evil example, and the jury ſhould find him guilty, I am afraid that no judgment could follow; becauſe though done *malo animo*, yet neither ſtatute nor precedent have perhaps determined it to be an indictable offence; it would be difficult to draw the line. An indictment would not lie for every inhuman

inhuman neglect of the ſufferings of the ſmalleſt innocent animals which Providence has ſubjected to us.

> Yet the poor beetle which we tread upon,
> In corporal ſuffering feels a pang as great
> As when a giant dies.

A thouſand other inſtances might be brought of acts baſe and immoral, and prejudicial in their conſequences, which are not yet indictable by law.

In the caſe of the King againſt Brewer, in Cowper's reports, it was held that *knowingly* expoſing to ſale and ſelling gold under ſterling for ſtandard gold, is not indictable; becauſe the act refers to goldſmiths only, and private cheating is not a common-law offence.

Here too the declaration of the jury that the defendant is guilty in manner and form as accuſed, does not change the nature of the accuſation: the verdict does not go beyond the charge; and if the charge be invalid in law, the verdict muſt be invalid alſo.

All theſe caſes therefore, and many ſimilar ones which might be put, are clearly conſiſtent with my principle; I do not ſeek to erect jurors into legiſlators or judges: there muſt be a rule of action

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in every ſociety which it is the duty of the legiſlature to create, and of judicature to expound when created. I only ſupport their right to determine guilt or innocence where the crime charged is blended by the general iſſue with the intention of the criminal; more eſpecially when the quality of the act itſelf even independent of that intention, is not meaſurable by any preciſe principle or precedent of law, but is inſeparably connected with the time when, the place where, and the circumſtances under which the defendant acted.

My Lord, in conſidering libels of this nature as oppoſed to ſlander on individuals to be mere queſtions of fact, or at all events to contain matter fit for the determination of the jury; I am ſupported not only by the general practice of courts, but even of thoſe very practiſers themſelves, who in proſecuting for the crown have maintained the contrary doctrine.

Your Lordſhips will I am perſuaded admit that the general practice of the profeſſion, more eſpecially of the very heads of it, proſecuting too for the public, is ſtrong evidence of the law. Attorney Generals have ſeldom entertained ſuch a jealouſy of the king's judges in ſtate proſecutions, as to lead them to make preſents of juriſdiction to juries, which did not belong to them of right by the conſtitution of the country. Neither can it be ſuppoſed, that men in high office and of great experience,

perience, ſhould in every inſtance (though differing from each other in temper, character, and talents) uniformly fall into the ſame abſurdity of declaiming to juries upon topics totally irrelevant, when no ſuch inconſiſtency is found to disfigure the profeſſional conduct of the ſame men in other caſes. Yet I may appeal to your Lordſhip's recollection, without having recourſe to the ſtate trials, whether upon every proſecution for a ſeditious libel within living memory, the attorney general has not uniformly ſtated ſuch writings at length to the jury, pointed out their ſeditious tendency which rendered them criminal; and exerted all his powers to convince them of their illegality, as the very point on which their verdict for the crown was to be founded.

On the trial of Mr. Horne, for publiſhing an advertiſement in favour of the widows of thoſe American ſubjects who had been *murdered* by the king's troops at Lexington; did the preſent chancellor, then Attorney General, content himſelf with ſaying that he had proved the publication, and that the criminal quality of the paper which raiſed the legal inference of guilt againſt the defendant, was matter for the court? no, my Lord, he went at great length into its dangerous and pernicious tendency, and applied himſelf with ſkill and ability to the underſtandings and the conſciences of the jurors. This inſtance is in itſelf deciſive of his opinion: that great magiſtrate could not

not have acted thus upon the principle contended for to day: he never was an idle declaimer; close and masculine argument is the characteristic of his understanding.

The character and talents of the late Lord Chief Justice De Grey, no less intitles me to infer his opinion from his uniform conduct.

In all such prosecutions while he was in office, he held the same language to juries, and particularly in the case of the King against Woodfall, *(to use the expression of a celebrated writer on the occasion)*, he tortured his faculties for more than two hours, to convince them that Junius's letter was a libel.

The opinions of another crown lawyer, who has since passed through the highest offices of the law, and filled them with the highest reputation, I am not driven to collect alone from his language as an Attorney General; because he carried them with him to the seat of justice. Yet one case is too remarkable to be omitted.

Lord Camden prosecuting Doctor Shebbeare, told the jury that he did not desire their verdict upon any other principle, than their solemn conviction of the truth of the information, which charged the defendant with a wicked design, to alienate

alienate the hearts of the ſubjects of this country from their king upon the throne.

To compleat the account: My learned friend Mr. Bearcroft, (though laſt not leaſt in favour) upon this very occaſion, ſpoke above an hour to the jury at Shrewſbury, to convince them of the libellous tendency of the dialogue, which ſoon afterwards the learned judge deſired them wholly to diſmiſs from their conſideration, as matter with which they had no concern. The real fact is, that the doctrine is too abſurd to be acted upon; too diſtorted in principle, to admit of conſiſtency in practice: it is contraband in law, and can only be ſmuggled by thoſe who introduce it: it requires great talents and great addreſs to hide its deformity: in vulgar hands it becomes contemptible.

Having ſupported the rights of juries, by the uniform practice of crown lawyers, let us now examine the queſtion of authority, and ſee how this court itſelf and its judges have acted upon trials for libels in former times; for according to Lord Raymond in Franklin's caſe (as cited by Mr. Juſtice Buller, at Shrewſbury,) the principle I am ſupporting, had it ſeems been only broached about the year 1731, by ſome men of party ſpirit, and then too for the very firſt time.

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My Lord, ſuch an obſervation in the mouth of Lord Raymond, proves how dangerous it is to take up as doctrine every thing flung out at *niſi prius*; above all upon ſubjects which engage the paſſions and intereſts of government. Becauſe the moſt ſolemn and important trials with which hiſtory makes us acquainted; diſcuſſed too at the bar of this court; and when filled with judges the moſt devoted to the crown, gives the moſt deciſive contradiction to ſuch an unfounded and unguarded aſſertion.

In the famous caſe of the ſeven biſhops, the queſtion of libel or no libel was held unanimouſly by the court of King's Bench trying the cauſe at the bar, to be matter for the conſideration and determination of the jury; and the biſhops' petition to the king, which was the ſubject of the information, was accordingly delivered to them, when they withdrew to conſider of their verdict.

Thinking this caſe deciſive, I cited it at the trial, and the anſwer it received from Mr. Bearcroft was, that it had no relation to the point in diſpute between us, for that the biſhops were acquitted not upon the queſtion of libel, but becauſe the delivery of the petition to the king was held to be no publication.

I was not a little ſurpriſed at this ſtate of it, but my turn of ſpeaking was then paſt; fortunately to day

day it is my privilege to ſpeak laſt, and I have now lying before me the fifth volume of the ſtate trials, where the caſe of the biſhops is printed, and where it appears that the publication was expreſsly proved; that nothing turned upon it in the judgment of the court; and that the charge turned wholly upon the queſtion of libel, which was expreſsly left to the jury by every one of the judges. Lord Chief Juſtice Wright, in ſumming up the evidence, told them, that a queſtion had at firſt ariſen about the publication, it being inſiſted on that the delivery of the petition to the king had not been proved; that the court was of the ſame opinion, and that he was juſt going to have directed them to find the biſhops not guilty, when in came my Lord Preſident (ſuch ſort of witneſſes were no doubt always at hand when wanted) who proved the delivery to his Majeſty. Therefore, continued the chief juſtice, if you believe it was the ſame petition, it is a publication ſufficient, and we muſt therefore come to enquire whether it be a libel.

He then gave his reaſons for thinking it within the caſe, *de libellis famoſis*, and concluded, by ſaying to the jury, "In ſhort, I muſt give you my "opinion: I do take it to be a libel; if my bro-"thers have any thing to ſay to it, I ſuppoſe they "will deliver their opinion." What opinion? not that the jury had no juriſdiction to judge of the matter, but an opinion for the expreſs purpoſe of

enabling

enabling them to give that judgment which the law required at their hands.

Mr. Juſtice Holloway then followed the chief juſtice, and ſo pointedly was the queſtion of libel or no libel, and not the publication, the only matter which remained in doubt, and which the jury with the aſſiſtance of the court were to decide upon; that when the learned judge went into the facts which had been in evidence, the chief juſtice ſaid to him, "Look you by the way, brother, I "did not aſk you to ſum up the evidence, but "only to deliver your opinion to the jury, whe-"ther it be a libel or no." The chief juſtice's remark, though it proves my poſition, was however very unneceſſary; for but a moment before, Mr. Juſtice Holloway had declared he did not think it was a libel, but addreſſing himſelf to the jury had ſaid, "*it is left to you, gentlemen.*"

Mr. Juſtice Powell who likewiſe gave his opinion that it was no libel, ſaid *to the jury*, "*But "the matter of it is before you, and I leave the iſſue "of it to God and your own conſciences:*" And ſo little was it in the idea of any one of the court, that the jury ought to found their verdict ſolely upon the evidence of the publication, without attending to the criminality or innocence of the petition; that the chief juſtice himſelf conſented, on their withdrawing from the bar, that they ſhould carry with them all the materials for coming to

a judgment as comprehenſive as the charge; and indeed expreſsly directed that the information, the libel, the declarations under the great ſeal, and even the ſtatute-book, ſhould be delivered to them.

The happy iſſue of this memorable trial, in the acquittal of the biſhops by the jury, exerciſing juriſdiction over the whole charge, freely admitted to them as legal even by King James's judges, is admitted by two of the gentlemen to have prepared and forwarded the glorious æra of the revolution. Mr. Bower, in particular, ſpoke with ſingular enthuſiaſm concerning this verdict, chuſing (for reaſons ſufficiently obvious) to aſcribe it to a ſpecial miracle wrought for the ſafety of the nation, rather than to the right lodged in the jury to ſave it by its laws and conſtitution.

My learned friend finding his argument like nothing upon the earth, was obliged to aſcend into heaven to ſupport it: having admitted that the jury not only acted like juſt men towards the biſhops, but as patriot citizens towards their country, and not being able without the ſurrender of his whole argument, to allow either their public ſpirit, or their private juſtice to have been conſonant to the laws, he is driven to make them the inſtruments of divine Providence to bring good out of evil, and holds them up as men inſpired by God to perjure themſelves in the adminiſtration

tion of juſtice, in order by-the-by to defeat the effects of that wretched ſyſtem of judicature which he is defending to-day as the conſtitution of England. For if the king's judges could have decided the petition to be a libel, the Stuarts might yet have been on the throne.

My Lord, this is the argument of a prieſt, not of a lawyer; and even if faith and not law were to govern the queſtion, I ſhould be as far from ſubſcribing to it as a religious opinion.

No man believes more firmly than I do, that God governs the whole univerſe by the gracious diſpenſations of his providence, and that all the nations of the earth riſe and fall at his command: but then this wonderful ſyſtem is carried on by the natural (though to us the often hidden) relation between effects and cauſes, which wiſdom adjuſted from the beginning, and which fore-knowledge at the ſame time rendered ſufficient, without diſturbing either the laws of nature or of civil ſociety.

The proſperity and greatneſs of empires ever depended, and ever muſt depend upon the uſe their inhabitants make of their reaſon in deviſing wiſe laws, and the ſpirit and virtue with which they watch over their juſt execution; and it is impious to ſuppoſe, that men who have made no proviſion for their own happineſs or ſecurity in their

attention to their government, are to be ſaved by the interpoſition of heaven in turning the hearts of their tyrants to protect them.

But if every caſe in which judges have left the queſtion of libel to juries in oppoſition to law, is to be conſidered as a miracle, England may vie with Paleſtine; and Lord Chief Juſtice Holt ſteps next into view as an apoſtle: for that great judge, in Tutchin's caſe, left the queſtion of libel to the jury in the moſt unambiguous terms: After ſumming up the evidence of writing and publiſhing, he ſaid to them as follows,

" You have now heard the evidence, and you " are to conſider whether Mr. Tutchin be guilty. " They ſay they are innocent papers, and no libels; " and they ſay nothing is a libel but what reflects " upon ſome particular perſon. But this is a very " ſtrange doctrine, to ſay, it is not a libel re- " flecting on the government, endeavouring to " poſſeſs the people that the government is " male-adminiſtered by corrupt perſons, that are " employed in ſuch or ſuch ſtations either in the " navy or army.

" To ſay that corrupt officers are appointed to " adminiſter affairs, is certainly a reflection on " the government. If people ſhould not be called " to account for poſſeſſing the people with an ill " opinion of the government, no government can " ſubſiſt.

" ſubſiſt. For it is very neceſſary for all govern-
" ments that the people ſhould have a good opinion
" of it: and nothing can be worſe to any govern-
" ment, than to endeavour to procure animoſities,
" as to the management of it; this has been al-
" ways looked upon as a crime, and no govern-
" ment can be ſafe without it be puniſhed."

Having made theſe obſervations, did the chief juſtice tell the jury that whether the publication in queſtion fell within that principle ſo as to be a libel on government, was a matter of law for the court, with which they had no concern?—Quite the contrary: he conſidered the ſeditious tendency of the paper as a queſtion for their ſole determination, ſaying to them,

" Now you are to conſider, whether theſe
" words I have read to you, do not tend to beget
" an ill opinion of the adminiſtration of the
" government. To tell us, that thoſe that are
" employed know nothing of the matter, and
" thoſe that do know are not employed. Men
" are not adapted to offices, but offices to men,
" out of a particular regard to their intereſt, and
" not to their fitneſs for the places; this is the
" purport of theſe papers."

In citing the words of judges in judicature I have a right to ſuppoſe their diſcourſe to be pertinent and relevant, and that when they ſtate the

defendant's anſwer to the charge, and make remarks on it, they mean that the jury ſhould exerciſe a judgment under their direction: this is the practice we muſt certainly impute to Lord Holt, if we do him the juſtice to ſuppoſe that he meant to convey the ſentiments which he expreſſed. So that when we came to ſum up this caſe, I do not find myſelf ſo far behind the learned gentleman even in point of expreſs authority; putting all reaſon, and the analogies of law which unite to ſupport me, wholly out of the queſtion.

There is court of king's bench againſt court of king's bench; Chief Juſtice Wright againſt Chief Juſtice Lee; and Lord Holt againſt Lord Raymond: as to living authorities it would be invidious to claſs them, but it is a point on which I am ſatisfied myſelf, and on which the world will be ſatisfied likewiſe if ever it comes to be a queſtion.

But even if I ſhould be miſtaken in that particular, I cannot conſent implicitly to receive any doctrine as the law of England, though pronounced to be ſuch by magiſtrates the moſt reſpectable, if I find it to be in direct violation of the very firſt principles of Engliſh judicature. The great juriſdictions of the country are unalterable but by Parliament, and until they are changed by that authority, they ought to remain ſacred; the judges have no power over them. What parliamentary abridgment has been made upon the rights of juries

juries ſince the trial of the biſhops, or ſince Tutchin's caſe, when they were fully recognized by this court? None. Lord Raymond and Lord Chief Juſtice Lee ought therefore to have looked there to their predeceſſors for the law, inſtead of ſetting up a new one for their ſucceſſors.

But ſuppoſing the court ſhould deny the legality of all theſe propoſitions, or admitting their legality ſhould reſiſt the concluſions I have drawn from them; then I have recourſe to my laſt propoſition, in which I am ſupported even by all thoſe authorities on which the learned judge relies for the doctrines contained in his charge; to wit,

"That in all caſes where the miſchievous intention (which is agreed to be the eſſence of the "crime) cannot be collected by ſimple inference "from the fact charged, becauſe the defendant "goes into evidence to rebut ſuch inference, the "intention becomes then a pure unmixed queſtion "of fact, for the conſideration of the jury."

I ſaid the authorities of the King againſt Woodfall and Almon were with me. In the firſt, which is reported in 5th Burrow, your Lordſhip expreſſed yourſelf thus: "Where an act in itſelf "indifferent, becomes criminal, when done with "a particular intent, there the intent muſt be "proved and found. But where the act is itſelf "unlawful (as in the caſe of a libel) the PROOF

" of juſtification or excuſe, lies on the defendant;
" *and in failure thereof, the law implies a criminal*
" *intent.*" Moſt luminouſly expreſſed to convey this ſentiment, viz. that when a man publiſhes a libel, and has nothing to ſay for himſelf, no explanation or exculpation, a criminal intention need not be proved: I freely admit that it need not; it is an inference of common ſenſe, not of law. But the publication of a libel, does not excluſively ſhew criminal intent, but is only an implication of law, in failure of the defendant's proof. Your Lordſhip immediately afterwards in the ſame caſe explained this further. " There
" may be caſes where the publication may be
" juſtified or excuſed as lawful OR INNOCENT;
" FOR NO FACT WHICH IS NOT CRIMI-
" NAL *though the paper* BE A LIBEL can amount
" to SUCH a publication of which a defendant
" ought to be found guilty." But no queſtion of that kind aroſe at the trial (i. e. on the trial of Woodfall.) Why? Your Lordſhip immediately explained why, " *Becauſe the defendant called no witneſſes,*" expreſsly ſaying, that the publication of a libel is not in itſelf a crime, unleſs the intent be criminal. And that it is not merely in mitigation of puniſhment, but that *ſuch* a publication does not warrant a verdict of guilty.

In the caſe of the King againſt Almon, a magazine containing one of Junius's letters, was ſold at Almon's ſhop; there was proof of that ſale at the

the trial. Mr. Almon called no witneſſes, and was found guilty. To found a motion for a new trial, an affadavit was offered from Mr. Almon, that he was not privy to the ſale, nor knew his name was inſerted as a publiſher; and that this practice of bookſellers being inſerted as publiſhers by their correſpondents without notice, was common in the trade.

Your Lordſhip ſaid, "Sale of a book in a book-"ſeller's ſhop, is *prima facie* evidence of publica-"tion by the maſter, and the publication of a "libel is *prima facie* evidence of criminal intent; "it ſtands good till anſwered by the defendant: "it muſt ſtand till contradicted or explained, "*and if not contradicted, explained, or exculpated,* "BECOMES *tantamount to concluſive when the defen-"dant calls no witneſſes.*"

Mr. Juſtice Aſton ſaid, "*Prima facie* evidence "*not anſwered* is ſufficient to ground a verdict "upon: if the defendant had a ſufficient excuſe "he might have proved it at the trial: his having "neglected it where there was no ſurpriſe, is no "ground for a new one." Mr. Juſtice Willes and Mr. Juſtice Aſhhurſt agreed upon thoſe expreſs principles.

Theſe caſes declare the law beyond all controverſy to be, that publication even of a libel, is no concluſive proof of guilt, but only *prima facie* evidence of it till anſwered; and that if the defendant

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can ſhew that his intention was not criminal, he compleatly rebuts the inference ariſing from the publication; becauſe though it remains true that he publiſhed, yet, according to your Lordſhip's expreſs words, it is not ſuch a publication of which a defendant ought to be found guilty. Apply Mr. Juſtice Buller's ſumming up, to this law, and it does not require even a legal apprehenſion to diſtinguiſh the repugnancy.

The advertiſement was proved to convince the jury of the Dean's motive for publiſhing; Mr. Jones's teſtimony went ſtrongly to it, and the evidence to character, though not ſufficient in itſelf, was admiſſible to be thrown into the ſcale. But not only no part of this was left to the jury, but the whole of it was expreſsly removed from their conſideration, although in the caſes of Woodfall and Almon, it was as expreſsly laid down to be within their cognizance, and a compleat anſwer to the charge if ſatisfactory to the minds of the jurors.

In ſupport of the learned judge's charge, there can be therefore but the two arguments, which I ſtated on moving for the rule: either that the defendant's evidence, namely the advertiſement; Mr. Jones's evidence in confirmation of its being *bona fide*; and the evidence to character, to ſtrengthen that conſtruction, were not ſufficient proof that the Dean believed the publication meritorious: and publiſhed it in vindication of his honeſt intentions:

or

or elſe, that even admitting it to eſtabliſh that fact, it did not amount to ſuch an exculpation as to be evidence on not guilty, ſo as to warrant a verdict. I ſtill give the learned judge the choice of the alternative.

As to the firſt, viz. whether it ſhewed honeſt intention in point of fact: that was a queſtion for the jury. If the learned judge had thought it was not ſufficient evidence to warrant the jury's believing that the Dean's motives were ſuch as he had declared them; I conceive he ſhould have given his opinion of it as a point of evidence, and left it there. I cannot condeſcend to go further; it would be to argue a ſelf-evident propoſition.

As to the ſecond, viz. that even if the jury had believed from the evidence, that the Dean's intention was wholly innocent, it would not have warranted them in accquitting, and therefore ſhould not have been left to them upon not guilty; that argument can never be ſupported. For, if the jury had declared, " We find that the Dean " publiſhed this pamphlet, whether a libel or not " we do not find: and we find further, that believing it in his conſcience to be meritorious " and innocent, he, *bona fide*, publiſhed it with " the prefixed advertiſement, as a vindication of his " character from the ſeditious intentions, and not to " excite ſedition." It is impoſſible to ſay, without

out ridicule, that on ſuch a ſpecial verdict the court could have pronounced a criminal judgment.

Then why was the conſideration of that evidence, by which thoſe facts might have been found, withdrawn from the jury, after they brought in a verdict guilty of publiſhing ONLY, which in the King againſt Woodfall, was only ſaid not to negative the criminal intention, becauſe the defendant called no witneſſes? Why did the learned judge confine his enquiries to the innuendos, and finding them agreed in, direct the epithet of guilty, without aſking the jury if they believed the defendant's evidence to rebut the criminal inference? Some of them poſitively meant to negative the criminal inference, by adding the word only, and all would have done it, if they had thought themſelves at liberty to enter upon that evidence. But they were told expreſsly that they had nothing to do with the conſideration of that evidence, which, if believed, would have warranted that verdict. The concluſion is evident; if they had a right to conſider it, and their conſideration might have produced ſuch a verdict, and if ſuch a verdict would have been an acquittal, it muſt be a miſdirection.

"But," ſays Mr. Bower, "if this advertiſement "prefixed to the publication, by which the Dean "profeſſed

" profeſſed his innocent intention in publiſhing it
" ſhould have been left to the jury as evidence of
" that intention, to found an acquittal on, even
" taking the dialogue to be a libel; no man could
" ever be convicted of publiſhing any thing how-
" ever dangerous: for he would only have to tack
" an advertiſement to it by way of preface, pro-
" feſſing the excellence of its principles and the
" ſincerity of his motives, and his defence would
" be compleat."

My Lord, I never contended for any ſuch poſition. If a man of education, like the Dean, were to publiſh a writing ſo palpably libellous, that no ignorance or miſapprehenſion imputable to ſuch a perſon could prevent his diſcovering the miſchievous deſign of the author; no jury would believe ſuch an advertiſement to be *bona fide*, and would therefore be bound in conſcience to reject it, as if it had no exiſtence: the effect of ſuch evidence muſt be to convince the jury of the defendant's purity of mind, and muſt therefore depend upon the nature of the writing itſelf, and all the circumſtances attending its publication.

If upon reading the paper and conſidering the whole of the evidence, they have reaſon to think that the defendant did not believe it to be illegal, and did not publiſh it with the ſeditious purpoſe charged by the indictment; he is not guilty upon any principle or authority of law, and would have been

been acquitted even in the ſtar-chamber: for it was held by that court in Lambe's caſe, in the eighth year of King James the Firſt, as reported by Lord Coke who then preſided in it; that every one who ſhould be convicted of a libel, muſt be the writer or contriver, or a *malicious* publiſher *knowing* it to be a libel.

This caſe of Lambe being of too high authority to be oppoſed, and too much in point to be paſſed over: Mr. Bower endeavours to avoid its force by giving it a new conſtruction of his own: he ſays, that not knowing a writing to be a libel, in the ſenſe of that caſe, means, not knowing the contents of the thing publiſhed; as by conveying papers ſealed up, or having a ſermon and a libel, and delivering one by miſtake for the other. In ſuch caſes he ſays, *ignorantia facti excuſat*, becauſe the mind does not go with the act; *ſed ignorantia legis non excuſat;* and therefore if the party knows the contents of the paper which he publiſhes, his mind goes with the act of publication, tho' he does not find out any thing criminal, and he is bound to abide by the legal conſequences.

This is to make criminality depend upon the conſciouſneſs of an act, and not upon the knowledge of its quality, which would involve lunatics and children in all the penalties of criminal law: for whatever they do is attended with conſciouſneſs though their underſtanding does not reach to the conſciouſneſs of offence.

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The publication of a libel, not believing it to be one after having read it, is a much more favourable caſe than publiſhing it unread by miſtake; the one, nine times in ten is a culpable negligence which is no excuſe at all; for a man cannot throw papers about the world without reading them, and afterwards ſay he did not know their contents were criminal: but if a man reads a paper, and not believing it to contain any thing ſeditious, having collected nothing of that tendency himſelf; publiſhes it among his neighbours as an innocent and uſeful work, he cannot be convicted as a criminal publiſher. How he is to convince the jury that his purpoſe was innocent, though the thing publiſhed be a libel, muſt depend upon circumſtances; and theſe circumſtances he may on the authority of all the caſes antient and modern, lay before the jury in evidence; becauſe if he can eſtabliſh the innocence of his mind, he negatives the very giſt of the indictment.

"In all crimes," ſays Lord Hale in his pleas of the crown, "the intention is the principal conſi-
"deration: it is the mind that makes the taking
"of another's goods to be felony, or a bare
"treſpaſs only: it is impoſſible to preſcribe all the
"circumſtances evidencing a felonious intent, or
"the contrary; but the ſame muſt be left to the
"attentive conſideration of judge *and jury;*
"wherein the beſt rule is in dubiis, rather to
"incline to acquittal than conviction."

In

In the ſame work he ſays, " By the ſtatute of " Philip and Mary, touching importation of coin, " counterfeit of foreign money, it muſt to make " it treaſon, be the intent to utter and make pay- " ment of the ſame; and the intent in this caſe " may be tried and found by circumſtances of " FACT, by words, letters, and a thouſand evi- " dences beſides the bare doing of the fact."

This principle is illuſtrated by frequent practice, where the intention is found by the jury as a fact in a ſpecial verdict.

It occurred not above a year ago, at Eaſt Grinſtead, on an indictment for burglary, before Mr. Juſtice Aſhurſt, where I was myſelf counſel for the priſoner. It was clear upon the evidence that he had broken into the houſe by force in the night, but I contended that it appeared from proof, that he had broken and entered with an intent to reſcue his goods, which had been ſeized that day by the officers of exciſe; which reſcue though a capital felony by modern ſtatute, was but a treſpaſs, temp. Henry VIII. and conſequently not a burglary.

Mr. Juſtice Aſhurſt ſaved this point of law, which the twelve judges afterwards determined for the priſoner; but in order to create the point of law, it was neceſſary that the priſoner's intention ſhould be aſcertained as a fact; and for this purpoſe, the learned judge directed the jury to tell him

him with what intention, they found that the priſoner broke and entered the houſe, which they did by anſwering, " To reſcue his goods;" which verdict was recorded.

In the ſame manner in the caſe of the King againſt Pierce, at the Old Bailey, the intention was found by the jury as a fact in the ſpecial verdict. The priſoner having hired a horſe and afterwards ſold him, was indicted for felony; but the judges doubting whether it was more than a fraud, unleſs he originally hired him intending to ſell him, recommended it to the jury to find a ſpecial verdict, comprehending their judgment of his intention, from the evidence. Here the quality of the act depended on the intention, which intention it was held to be the excluſive province of the jury to determine, before the judges could give the act any legal denomination.

My Lord, I am aſhamed to have cited ſo many authorities to eſtabliſh the firſt elements of the law, but it has been my fate to find them diſputed. The whole miſtake ariſes from confounding criminal with civil caſes. If a printer's ſervant, without his maſter's conſent or privity, inſerts a ſlanderous article againſt me in his newſpaper, I ought not in juſtice to indict him; and if I do, the jury *on ſuch proof* ſhould acquit him; but it is no defence to an action, for he is reſponſible to me civiliter for the damage which I have ſuſtained from

the newſpaper, which is his property. Is there any thing new in this principle? ſo far from it that every ſtudent knows it as applicable to all other caſes; but people are reſolved from ſome fatality or other, to diſtort every principle of law into nonſenſe, when they come to apply them to printing; as if none of the rules and maxims which regulate all the tranſactions of ſociety had any reference to it.

If a man riſing in his ſleep, walks into a china ſhop, and breaks every thing about him; his being aſleep is a compleat anſwer to an indictment for a treſpaſs, but he muſt anſwer in an action for every thing he has broken.

If the proprietor of the York coach, though aſleep in his bed at that city, has a drunken ſervant on the box at London, who drives over my leg and breaks it, he is reſponſible to me in damages for the accident; but I cannot indict him as the criminal author of my misfortune. What diſtinction can be more obvious and ſimple.

Let us only then extend theſe principles, which were never diſputed in other criminal caſes, to the crime of publiſhing a libel; and let us at the ſame time allow to the jury as our forefathers did before us, the ſame juriſdiction in that inſtance, which we agree in rejoicing to allow them in all others, and the ſyſtem of Engliſh law will be wiſe, harmonious, and compleat.

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My Lord, I have now finiſhed my argument, having anſwered the ſeveral objections to my five original propoſitions, and eſtabliſhed them by all the principles and authorities which appear to me to apply, or to be neceſſary for their ſupport. In this proceſs I have been unavoidably led into a length not more inconvenient to the court than to myſelf, and have been obliged to queſtion ſeveral judgments which had been before queſtioned and confirmed.

They however who may be diſpoſed to cenſure me for the zeal which has animated me in this cauſe, will at leaſt, I hope, have the candour to give me credit for the ſincerity of my intentions: it is ſurely not my intereſt to ſtir oppoſition to the decided authorities of the court in which I practice: with a ſeat here within the bar, at my time of life, and looking no farther than myſelf, I ſhould have been contented with the law as I found it, and have conſidered *how little* might be ſaid with decency, rather than *how much*; but feeling as I have ever done upon the ſubject, it was impoſſible I ſhould act otherwiſe. It was the firſt command and council to my youth, always to do what my conſcience told me to be my duty, and to leave the conſequences to God. I ſhall carry with me the memory, and I hope, the practice of this parental leſſon to the grave: I have hitherto followed it, and have no reaſon to complain that the adherence to it has been even a tem-

poral

poral ſacrifice; I have found it on the contrary, the road to proſperity and wealth, and ſhall point it out as ſuch to my children. It is impoſſible in this country to hurt an honeſt man; but even if it were, I ſhould little deſerve that title, if I could upon any principle have conſented to tamper or temporiſe with a queſtion which involves in its determination and its conſequences, the liberty of the preſs; and in that liberty, the very exiſtence of every part of the public freedom.

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3. Head of Lieut. King, from a Painting by Wright.
4. View of Botany Bay, with the Supply and Sirius at Anchor, and the Tranſports coming in.
5. A large Chart of Port Jackſon.
6. A View in Port Jackſon, with the Natives in their Canoes trouling.
7. View of the Natives in Botany Bay.
8. Map of Lord Howe Iſland.
9. View of ditto.
10. View of Natives and a Hut in New South Wales.
11. View of New South Wales.
12. A large Plan of the Eſtabliſhment at Sydney Cove, Port Jackſon.
13. A large Chart of Norfolk Iſland.
14. View of Ball's Pyramid.
15. Chart of Lieut. Shortland's New Diſcoveries.
16. Track of the Alexander from Port Jackſon to Batavia.
17. Chart of Capt. Marſhall's New Diſcoveries.

18. View

18. View of the Natives in their ſailing Canoe at Mulgrave's Iſlands.
19. View of Curtis's Iſland.
20. View of Macaulay's Iſland.
21. Caſpian Tern.
22. The Kanguroo.
23. The Spotted Opoſſum.
24. Vulpine Opoſſum.
25. Norfolk Iſland Flying Squirrel.
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29. Pacific Parrot.
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31. Superb Warbler, male.
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36. Wattled Bee-eater.
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39. Kanguroo Rat.
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41. The Black Cockatoo.
42. Red-ſhouldered Parakeet.
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